Supreme Court, U.S.
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No. 99-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding–contrary to decisions of this Court, other courts of appeals, and state courts, as well as the *Restatements* and leading treatises–that petitioner could not receive restitution of the $78 million paid to the United States for oil and gas leases following the enactment of a statute, which the trial court found "clearly reduce[d] the value and materially alter[ed] the structure and framework" of those leases, because (1) petitioner had not proved that this material breach of its leases caused it any injury and (2) Congress repealed the statute after petitioner filed suit asserting material breach?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: The United States, Mobil Oil Exploration & Producing Southeast, Inc., and Marathon Oil Company.

All of the stock of Mobil Oil Exploration & Producing Southeast, Inc., is owned by its immediate parent, Mobil Exploration & Producing North America Inc. All of the stock of Mobil Exploration & Producing North America Inc. is, in turn, owned by Mobil Corporation, the ultimate parent of Mobil Oil Exploration & Producing Southeast, Inc. Mobil Corporation is a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil") respectfully petitions this Court for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 158 F.3d 1253. Appendix ("App.") 22a. The revised opinion of the court of appeals is reported at 177 F.3d 331. App. 1a. The order of the court of appeals granting the petition for rehearing for the limited purpose of revising the court's initial opinion and denying Mobil's suggestion for rehearing in banc is also reported at 177 F.3d 331. App. 94a. The April 1, 1996, opinion of the United States Court of Federal Claims, which was reversed by the court of appeals, is reported at 35 Fed. Cl. 309. App. 40a.

JURISDICTION

The decision of the court of appeals that is the subject of this petition was entered May 13, 1999. That decision revised the court of appeals' October 15, 1998, decision pursuant to a timely petition for rehearing filed on November 25, 1998. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1340(c)(1) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1340(c)(1), provides in pertinent part:

> The Secretary [of the Interior] shall approve [a] plan [of exploration], as

submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title [*i.e.*, that the proposed activity "would probably cause serious harm or damage to . . . the marine, coastal, or human environment"], and (B) such proposed activity cannot be modified to avoid such condition.

Section 6003(c) of the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555, *repealed by* Pub. L. No. 104-134, 110 Stat. 1321-177 (April 26, 1996), provides in pertinent part that:

(c)(1) The Secretary of the Interior shall not –

***

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling for oil or gas under the [OCSLA] on any lands of the Outer Continental Shelf offshore North Carolina.

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(3) The prohibition under paragraph (1) shall remain in effect until the later of –

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e) . . . .

STATEMENT OF THE CASE

Mobil paid the United States more than $78 million in 1981 to acquire a one-third interest in oil and gas leases on the Outer Continental Shelf ("OCS") offshore North Carolina. A. 180-81, 183-84. In 1990, Congress enacted the OBPA which the Court of Federal Claims characterized as "compel[ing] governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving a rise to 'total breach.'" App. 71a. In a decision that ignores settled contract law, conflicts with a recent Ninth Circuit decision, and undermines billions of dollars of Government contracts, the Federal Circuit held that Mobil was not entitled to rescission and restitution of the monies that it had paid to the Government for its leases because it had not proved that the OBPA was the exclusive cause of Mobil's inability to exploit the oil and gas resources on the North Carolina OCS.

The Facts Giving Rise To This Case

In 1989, Mobil, acting on behalf of seven other energy companies that had also purchased interests in OCS leases, agreed with the Department of the Interior ("DOI") and the State of North Carolina to delay submission of a final

plan of exploration ("POE") for what would have been the first exploratory well offshore North Carolina in order to give DOI an opportunity to prepare an analysis of the environmental impacts associated with that well. A. 263-66. The 2000-page Environmental Report produced by DOI in June 1990 constitutes "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." A. 949-50. After reviewing that report, DOI determined that Mobil's proposed exploration would not result in any significant environmental impacts. A. 950, 962.

Under the OCSLA, 43 U.S.C. § 1340(c)(1), the Secretary was required to approve Mobil's POE within 30 days unless he found that the proposed activities would probably cause serious harm to the environment. However, the OBPA was enacted on August 18, 1990, before that approval. That Act prohibited DOI from approving any North Carolina OCS POE or any other permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate that he had received a report from the science review panel established by the OBPA and had concluded that sufficient information was available to allow him to carry out his responsibilities under the OCSLA. The OBPA was regarded by DOI officials at the highest levels as an act of "bad faith," lacking any scientific basis, that was inconsistent with the terms of Mobil's OCS leases. A. 954-55.

The OBPA scientific panel did not submit its report until January 1992. A. 318. After receiving that report, Secretary Lujan certified in April 1992 that current information was adequate, but he nonetheless refused to approve Mobil's POE until completion of the two studies recommended by the OBPA panel. A. 414-15. Those studies were not completed until July 1994. A. 533.

Moreover, Secretary Lujan's decision dealt only with the first Manteo exploratory well, A. 415, and the OBPA panel determined that additional studies would be required before deciding whether to permit any of the numerous additional wells that would be required to explore and develop the area. A. 412-15.

Mobil faced another potential barrier to drilling its first exploration well based upon the Coastal Zone Management Act ("CZMA"). Pursuant to 16 U.S.C. § 1456(c)(3)(B), North Carolina on November 19, 1990, objected to Mobil's POE.[1] North Carolina did not object to OCS exploration per se, but instead argued (based in large part upon the OBPA) that there were insufficient environmental studies to proceed with drilling. A. 316. Under the CZMA, DOI was, accordingly, barred from issuing the drilling permit contemplated by Mobil's POE, unless Mobil successfully appealed North Carolina's objection to the Secretary of Commerce or amended its POE to achieve consistency by conducting the additional studies demanded by North Carolina. On September 2, 1994, the Secretary of Commerce rejected Mobil's appeal.[2]

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[1] On July 17, 1990, North Carolina similarly objected to EPA's issuance of a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1311, for the discharges into ocean waters associated with exploration. A. 280. Unlike the State's later objection to Mobil's POE, North Carolina's objection to the CWA permit would not necessarily have barred exploratory drilling. *See* A. 518 (discussing the State's proposal for a "no discharge" CWA permit contemplating the barging of discharges to shore).

[2] Mobil and the other lessees filed an action in U.S. District Court challenging the Secretary of Commerce's rejection of the CZMA appeal. The District Court has remanded the case to the Secretary of Commerce for a determination whether the administrative record should be reopened to receive the two completed studies required by the OBPA scientific review panel. (...continued)

Proceedings In The Court Of Federal Claims

Confronted with Secretary Lujan's April 1992 decision interpreting the OBPA as requiring years of additional studies not only for the first exploration well offshore North Carolina, but also for every subsequent exploration, delineation, and production well, Mobil and all the other North Carolina OCS lessees filed suit under 28 U.S.C. § 1491 in the United States Court of Federal Claims. They alleged, *inter alia*, that the enactment and application of the OBPA constituted a material breach by anticipatory repudiation of their leases which entitled them to restitution of all the monies which they had paid to acquire and maintain the leases. The Government defended principally on the ground that under the terms of the OCS leases, as construed pursuant to the unmistakability and sovereign acts doctrines,[3] the lessees could not properly complain of the application of the OBPA to their leases even though it was enacted years after the leases were acquired.

On April 1, 1996, the Court of Federal Claims issued its opinion granting summary judgment for Mobil and the other plaintiffs on their material breach theory. App. 40a. Addressing the Government's principal argument, the court held that Mobil and the other companies' OCS leases were not subject to something as unforeseeable as the OBPA, App. 59a-64a, which "specifically targeted plaintiffs and prevented them from exercising their lease rights," App. 91a. The Court, therefore, concluded that the OBPA constituted an

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[3] *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996).

anticipatory repudiation and material breach of the companies' OCS leases:

> Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore . . . compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

App. 71a; *see also* App. 63a (OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions").[4]

Following additional proceedings regarding remedy, judgment was entered for Mobil in the amount of $78,257,565, A. 101 – restitution (without interest) of the bonus monies Mobil paid to the Government in 1981 to acquire its interest in the North Carolina leases.[5]

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[4] The Government paid so little attention to the CZMA in briefing and arguing summary judgment that the court did not directly address that statute. It did hold, however, that because the OBPA "legislatively barred [DOI] from performing," it was "not necessary for plaintiff [even] to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA." App. 73a. Had Mobil simply filed suit without filing a POE or seeking permits from EPA under the CWA, the CZMA would never have come into play in this case.

[5] Judgment in a slightly smaller amount was similarly entered on behalf of Marathon Oil Company. A. 102.

Proceedings In The Federal Circuit

The Government appealed to the Federal Circuit. However, in that court the Government abandoned its principal argument below based on the sovereign acts and unmistakability doctrines, thus conceding that the OBPA was inconsistent with Mobil's leases. Instead, the Government argued that under the OCSLA it had the authority to delay grant of permits needed to drill for oil and gas off North Carolina. The Government also argued that Mobil had effectively waived any material breach occasioned by the OBPA by virtue of its continued efforts to achieve approval of its POE. Lastly, the Government argued that the OBPA could not sustain Mobil's arguments for material breach and restitution because Mobil was independently barred by the CZMA from obtaining the permits necessary to conduct exploration. In advancing this argument, the Government did not contend that the April 26, 1996, repeal of the OBPA (nearly a month after the Court of Federal Claims' decision) could in any way relieve it from liability for the material breach declared by that court.[6]

Nonetheless, on October 15, 1998, a majority of the Federal Circuit panel (Judges Plager and Schall, with Judge Newman dissenting) reversed the judgment below and rested its decision exclusively upon the impact of the CZMA on Mobil's POE and the repeal of the OBPA. Characterizing Mobil as seeking to recover damages for the "delay" in approving its POE introduced by the OBPA, the panel majority held that the CZMA consistency objections were independent causes of delay and cited five cases holding that

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[6] *See* 141 Cong. Rec. H9443, daily ed. (Sept. 21, 1995) ("The repeal [of the OBPA] is not intended to excuse the United States from the liabilities, if any, it has incurred to date nor to otherwise affect pending litigation").

claims for delay damages should be rejected where there is an independent cause of delay not attributable to the acts of the defendant. App. 33a-34a. To further support its denial of "delay damages," the panel majority construed the OCS leases as placing an obligation upon Mobil to achieve CZMA consistency and as giving the Government the right to cancel such leases in the event that consistency is not achieved. App. 31a-32a, 37a. The panel majority also relied upon a provision of the OCSLA, 43 U.S.C. § 1351(h)(2), which denies compensation under that Act if a CZMA consistency objection bars OCS development and production, as opposed to exploration. App. 36a-37a.[7]

Mobil sought panel rehearing and suggested rehearing in banc. The petition pointed out that the court had erred in characterizing restitution as "delay damages." Mobil also argued that the court had misconstrued the relevant provisions of the OCS leases with respect to its purported obligation to achieve CZMA consistency, as well as the OCSLA with respect to the award of compensation where a CZMA consistency objection bars OCS exploration.[8]

On May 13, 1999, the panel majority (with Judge Rader replacing Judge Schall, who recused himself on rehearing) issued a new opinion which excised the court's

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[7] Judge Newman's dissent followed the lines of one of the arguments advanced by Mobil in its brief: that a CZMA consistency objection would not preclude the restitution sought by the companies since, at most, it raised an issue of impossibility of performance which under settled law would require restitution of their bonuses. App. 38a-39a.

[8] As to the latter, Mobil showed that a CZMA consistency objection at the exploration stage is governed by 43 U.S.C. § 1340(c), which, unlike § 1351(h)(2), is silent regarding statutory compensation.

erroneous discussion of delay damages and its misconstruction of the OCS leases and the OCSLA, while offering no new rationale for the court's decision.[9] Stripped of the underpinnings provided in its initial opinion, the panel majority's ultimate decision was expressed as follows:

> The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's consistency objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.

App. 13a. The court of appeals moved from this proposition to its ultimate conclusion two sentences later in its opinion:

> Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA.

App. 13a. Accordingly, the rationale for the court of appeals' decision in this case rests upon two related propositions – that the CZMA, not the OBPA, caused Mobil's damages and that the OBPA's repeal during the pendency of North

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[9] Judge Newman reiterated her dissent, albeit in more expansive terms. App. 17a-21a.

Carolina's CZMA objection absolved the Government from liability.[10]

REASONS FOR GRANTING THE WRIT

The panel majority's decision fundamentally misunderstands or ignores basic contract law principles established by this and other courts. In doing so, the decision conflicts with a recent decision of the Ninth Circuit and is out of step with this Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Unless corrected by this Court, the decision below threatens to undermine the foundation for billions of dollars of private investment in contracts where parties, like Mobil here, have paid enormous up-front bonuses to the United States.

I. THE FEDERAL CIRCUIT'S DECISION IS CONTRARY TO UNIFORMLY ACKNOWLEDGED PRINCIPLES OF CONTRACT LAW

Both the Federal Circuit's original opinion and its "redacted" version are based upon the conclusion that North Carolina's CZMA consistency objection was an independent "cause" of Mobil's damages until the OBPA was repealed. The panel majority's reliance on the CZMA as the "cause" of Mobil's injury – and, relatedly, on the repeal of the OBPA while North Carolina's CZMA objection was still in place – confounds settled principles of contract law.

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[10] Five members of the Federal Circuit recused themselves. The remaining three who were not members of the panel voted to deny the suggestion for rehearing in banc. App. 94a-95a.

A. The Federal Circuit's Reliance Upon North Carolina's CZMA Consistency Objection As An Independent "Cause" Of Mobil's Injury Is Contrary To Principles Of Contract Law Uniformly Acknowledged By This And Other Courts.

The panel majority never questioned the Court of Federal Claims' express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" App. 71a. In fact, the panel majority *agreed* with that court's assessment that the OBPA could not be reconciled with the terms of Mobil's leases. App. 9a-10a. Moreover, the panel majority expressed no doubt that restitution is an appropriate remedy for a material breach by anticipatory repudiation. Instead, it held that Mobil was not entitled to such relief because it had "not established that [its] inability to obtain secretarial approval of the POE and to undertake exploratory activity was *caused* by the [OBPA] moratorium rather than by the fact that [it was] unable to provide the necessary state concurrence to [its] certification of CZMA compliance." App. 12a (emphasis added).

The panel majority's focus on causation would have been appropriate if Mobil were seeking "delay damages," as the panel majority mistakenly believed in its initial opinion. App. 33a-34a. But as Mobil pointed out in its rehearing petition and the panel majority effectively acknowledged in its revised opinion, Mobil was *not* seeking delay damages based upon DOI's failure to approve its POE within the 30 days specified by OCSLA § 1340(c). Instead, as Judge Newman correctly observed in her dissent, Mobil was seeking restitution for the Government's material breach. App. 17a.

It is a axiomatic that "on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 373 (1981); *accord Restatement of Restitution* § 108(a) (1937) ("A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution ... if the other has committed a material breach of contract."); 4 Arthur L. Corbin, *Corbin on Contracts* § 979, at 928 (1951) ("If a repudiation is recognized as a breach of contract, the injured party is given the alternative remedy of restitution ....").[11] This Court has long recognized this fundamental principle. *See Ankeny v. Clark*, 148 U.S. 345, 353 (1893):

> It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission.

Other federal courts – including the Federal Circuit, which has ordered restitution in cases involving Government contracts requiring large advance deposits, *see Stone Forest*

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[11] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

Indus., Inc. v. United States, 973 F.2d 1548, 1550 (Fed. Cir. 1992) – have uniformly followed this principle.[12]

Contrary to all this authority, the panel majority concluded that North Carolina's CZMA consistency objection was an independent and supervening cause of Mobil's loss, which destroyed Mobil's right to restitution. But the question whether, in addition to the OBPA, the CZMA also contributed to Mobil's injury is irrelevant to Mobil's claim for restitution. None of the formulations of the rescission-and-restitution rule so much as hints that the aggrieved party must show that the breaching party's repudiation caused its loss. To the contrary, all make clear that the innocent party's right to rescind the contract and obtain restitution is absolute. *See, e.g.*, *Ankeny*, 148 U.S. at 353 (holding that "whenever" one party anticipatorily repudiates a contract, the other party has "thereupon" a "right" to rescind the contract and seek restitution); *Restatement (Second) of Contracts* § 373 (1981) (stating that upon a repudiation an injured party is "entitled" to restitution). This is in marked contrast to the role that causation plays in the context of "expectation" damages, where "[t]he injured party is limited to damages based on his actual loss caused by the breach" and "[r]ecovery can be had

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12 *See, e.g., Elyea v. RCA Victor Co.*, 79 F.2d 759, 760 (5th Cir. 1935) (applying federal common law in the pre-*Erie* era); *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 490 (10th Cir. 1930) (same); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) (same). *See also Lee v. Foote*, 481 A.2d 484, 485-86 & nn. 3, 6 (D.C. Ct. App. 1984) (collecting state court decisions from numerous jurisdictions and holding that "[w]hen an express contract has been repudiated or materially breached by the defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract").

only for loss that would not have occurred but for the breach." *Id.* § 347 cmt. e.

Two corollary principles confirm the irrelevance of causation to a claim for restitution. First, courts have long recognized that the requirement that a breach-of-contract plaintiff suing for traditional expectation damages show that he is "ready, willing, and able" to perform has no application in restitution. As one court put it, although in a suit for expectation damages a plaintiff "must tender and prove his own readiness, willingness, and ability to perform," a party seeking restitution need not make such a showing; rather, in an "action to rescind and recover payments made on account of the purchase price *it is enough to show a breach by the seller*." *Weintraub v. Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (Sup. Ct. 1962) (emphasis added); *accord* 4 Corbin, *supra*, § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform . . . . The rule is not quite the same with respect to the right to restitution of money paid or of the value of other benefits under the contract.").

Second, the availability of restitution in "losing contract" situations likewise demonstrates the irrelevance of causation to claims for restitution. The *Restatement (Second) of Contracts* is illustrative:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. *The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B.*

Restatement (Second) of Contracts § 373 illus. 1 (1981) (emphasis added). Indeed, the Federal Circuit's own decision in *Stone Forest*, 973 F.2d at 1553, recognized this principle in awarding restitution of monies paid to the Government upon its repudiation of a timber contract, even though the lower court had found that the plaintiff had not sought "traditional breach of contract damages" because "it could prove none," *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 494 & n.7 (1991).

B. The Federal Circuit's Decision That The Repeal Of The OBPA Cured The Government's Material Breach Is Contrary To Uniformly Acknowledged Principles Of Contract Law.

As noted above, p. 6, the OBPA introduced new and unanticipated regulatory hurdles not only for Mobil's first POE for the Manteo area, but also for *every* subsequent permit that Mobil would need to delineate oil and gas resources and ultimately to produce such resources and transport them to shore. Mobil argued in the Federal Circuit that North Carolina's CZMA objection pertained only to the first POE for the area and was based upon a purported lack of environmental studies which could, if necessary, be conducted, thereby clearing the path for later exploration, development, and production. Accordingly, even if the CZMA objection were regarded as the cause of the delay inherent in obtaining approval of the first POE, it would not excuse the material breach caused by the OBPA.

The panel majority rejected Mobil's characterization of the OBPA as a "continuing open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development and production of oil and gas resources in that area," by observing that North Carolina's CZMA objection "resulted in a delay that preceded and extended throughout *the period in*

which the OBPA was effective." App. 13a (emphasis added). This vital underpinning of the Court's decision – that the CZMA, *not* the OBPA, was the exclusive cause of the delay that Mobil encountered – can only be understood as resting upon the premise that the repeal of the OBPA in 1996 during the pendency of North Carolina's CZMA objection (but four years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. This holding of the Federal Circuit, like its reliance on causation generally, defies settled law.

It is, of course, true that "[t]he effect of a statement as constituting a repudiation … is nullified by a retraction of the statement …." *Restatement (Second) of Contracts* § 256 (1981). However, a retraction is effective only "if notification … comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* Significantly, "[t]he bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." 4 Corbin, *supra*, § 980, at 931; 11 Samuel Williston, *A Treatise on the Law of Contracts* § 1335, at 182-83 (Walter H.E. Jaeger, ed., 3d ed. 1968) ("If … the contract has been totally rescinded, or an action has been brought … such withdrawal is ineffectual."); *Restatement (Second) of Contracts* § 256 cmt. c (1981) ("Cancellation of the contract or the commencement of an action claiming damages for total breach would be sufficient [to preclude retraction].").

Federal courts and state courts agree that by filing suit an injured party cuts off a breaching party's right to retract its anticipatory repudiation. *See, e.g., United States v. Seacoast Gas Co.*, 204 F.2d 709, 711 (5th Cir. 1953) ("All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied . . . by the filing of a

suit . . . ."); *Lake Erie Distributors, Inc. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (App. Div. 1995) ("The commencement by plaintiff of its lawsuit was an objective expression of plaintiff's intent to treat [defendant's] repudiation as a final breach .... Therefore, [defendant's] attempted retraction after the lawsuit was commenced was ineffective.").

Congress passed the OBPA – and thereby anticipatorily repudiated Mobil's 1981 OCS lease agreements – in August 1990. Mobil brought suit on October 28, 1992. The OBPA was repealed on April 26, 1996. *See supra* p. 8 & n. 6. That action – four years after Mobil filed suit and a month after the Court of Federal Claims' opinion – was far too late to "cure" the anticipatory repudiation that occurred when the OBPA was enacted.

II. THE FEDERAL CIRCUIT'S DECISION SQUARELY CONFLICTS WITH A RECENT DECISION OF THE NINTH CIRCUIT

In view of the implications of erroneous decisions for the integrity and stability of OCS leases, this Court has granted certiorari, even without a circuit conflict, to correct misconstruction of the OCSLA as it bears upon the financial arrangements for OCS leases, *see Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981), and misapplication of the CZMA to OCS leases, *see Secretary of the Interior v. California*, 464 U.S. 312 (198.). The Federal Circuit's decision below presents an *a fortiori* case for exercise of this Court's certiorari jurisdiction because, in addition to the implications of the panel's decision for OCS leasing – *see* Part III below – the decision squarely conflicts with *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997).

The facts underlying *Far West* are similar in many respects to those underlying *Winstar*, 518 U.S. 839. In

response to a request by the Federal Home Loan Bank Board, a group of investors agreed to recapitalize a failing thrift based on certain regulatory forbearances set forth in an agreement with the Board. Congress later enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), which mandated regulatory action inconsistent with that agreement. The investors sued, seeking rescission of the agreement and restitution, which the district court eventually granted. *See Far West Federal Bank, S.B. v. OTS*, 787 F. Supp. 952 (D. Ore. 1992).

In urging reversal on appeal, the Government argued that FIRREA had not caused the investors any economic harm because a district court injunction had "effectively shieided" them from "whatever adverse impact [they] might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit affirmed the district court, declaring that the Government's argument that FIRREA had not actually caused Far West's losses "misses the point." *Id.*

> At the moment OTS announced its intention to impose FIRREA regulations on Far West, the Government repudiated the Conversion Agreement. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Id. (emphasis added). The Ninth Circuit then made crystal clear that an injured party seeking restitution is not required to demonstrate that the breaching party's repudiation actually caused its losses: "FDIC's argument implies that the Investors would have to prove that they suffered consequential damages (*e.g.*, loss of their investment) in

order to sue for breach. There is simply no basis in contract law for this proposition." *Id.*

In holding that an injured party has an "absolute right" – irrespective of proof of causation – to obtain rescission and restitution upon an anticipatory repudiation, the Ninth Circuit in *Far West* followed time-honored contract law principles, which, as shown in Part I, have been expressed and affirmed throughout the years by this Court, other federal and state courts, the *Restatements*, and prominent contract law scholars. The Federal Circuit's decision conflicts not only with *Far West*, but also with the settled law that underlies the Ninth Circuit's holding.

III. THE FEDERAL CIRCUIT'S DECISION WILL HAVE PROFOUND CONSEQUENCES FOR OCS LEASING, AS WELL AS OTHER FEDERAL CONTRACTING, LEASING, AND LICENSING PROGRAMS

The significance of the issues decided by the panel majority transcends the very substantial sums that are directly at issue in this case. The Court of Federal Claims, whose decisions are reviewed by the Federal Circuit, is generally the only court in which parties like Mobil, who have paid significant monies to the Federal Government, can seek restitution when confronted with a material breach of contract by the Government.[13] The decision below, if not corrected by this Court, effectively deprives private parties of that remedy whenever the Government can point to some

[13] Cases involving less than $10,000 may be brought in district court pursuant to 28 U.S.C. § 1346(a)(2). Moreover, as *Far West* demonstrates, cases may be brought in district court against agencies whose organic acts contain "sue and be sued" clauses. 119 F.3d at 1362 n.1.

other reason why the party aggrieved by a material breach might not have enjoyed the benefits of its contract.

Most directly, the panel's decision threatens the integrity of thousands of OCS leases – involving billions of dollars in private investment – issued by the United States under the OCSLA. At year-end 1997, there were 7359 OCS leases outstanding. *See* Mineral Revenues 1997: Report on Receipts, DOI Minerals Management Service (Nov. 1998). During the last three fiscal years alone, companies like Mobil paid the Government more than $3.6 billion in bonus payments for new OCS leases. *See* U.S. Department of the Interior Minerals Management Service, Mineral Revenues 1998 (Preliminary), at 51 tbl.20 (1999) (visited July 28, 1999) <http://www.rmp.mms.gov/library/statroom/MR.htm>.

The effects of the Federal Circuit's decision extend beyond the OCS leasing program to every Government contracting, leasing, and licensing program administered under a statutory scheme requiring investors to pay large front-end bonuses or undertake large investments. Among the most noteworthy –

- *The Communications Act of 1934*, 47 U.S.C. § 309(j), permits the FCC to auction licenses for segments of the electromagnetic spectrum. Since 1993, the Government has collected an estimated $11 billion in revenues from successful bids.[14]

- *The Federal Coal Leasing Amendments Act of 1976*, 30 U.S.C. 201(a)(1), authorizes the Government to lease land to private parties for

[14] *See* Federal Communications Commission, Wireless Telecommunications Bureau (visited July 28, 1999) <http://www.fcc.gov/wtb/auctions.html>.

coal mining. In fiscal year 1998 alone, the Government collected more than $140 million in up-front bonus payments.[15]

- *The Oil and Gas Prospecting Act*, 30 U.S.C. §§ 223, 226(b), permits the Government to lease its land for oil and gas exploration. During fiscal years 1996, 1997, and 1998, bidders paid nearly $168 million to the Government in advance bonus payments.[16]

- *The Mineral Lands Leasing Act (Sodium Provisions)*, 30 U.S.C. §§ 261, 262, allows the Government to lease lands for the exploration of various forms of sodium. During fiscal years 1996, 1997, and 1998, the Government collected more than $14 million in bonus payments from lessees.[17]

- *The National Forest Management Act*, 16 U.S.C. § 472a, permits the Government to grant contracts for the sale and harvesting of timber on federal lands. Successful contractors are required to pay substantial sums of money – often many hundreds of thousands of dollars – in advance.

The decision below gives the Federal Government an opportunity to argue, whenever new statutory or regulatory restrictions are imposed upon existing contracts, leases, or

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15 *See* U.S. Department of the Interior Bureau of Land Management, Public Land Statistics 1998, at 108-11 tbl.3-18 (1999).

16 *See id.* at 94 tbl.3-13 (1999).

17 *See id.* at 113-14 tbl.3-19 (1999).

licenses, that restitution is not available. Many, if not most, Government contracts are subject to a complex web of regulations – mineral leases, for instance, are subject, to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and various other environmental and land-use statutes. In future cases, taking its cue from the decision below, the Government will be free to restructure or even repudiate its agreements and offer the post hoc rationalization that some other statute or regulation – the equivalent of the CZMA in this case – served as an independent and supervening cause of the innocent parties' losses.

The animating "theme" of this Court's decision in *Winstar* is that, when the Federal Government enters into contractual arrangements with private parties, it must play by the same rules as everyone else. *See, e.g.*, *Winstar*, 518 U.S. at 895 ("[A]llowing the Government to avoid contractual liability by passing any 'regulatory statute' would flout the general principle that, '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934))); 518 U.S. at 895 n.39 ("The United States does business on business terms." (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943))); 518 U.S. at 896 ("[T]he Government is to be treated like other contractors.").

By permitting the Government in this case to enact legislation which materially breached its lease agreements with Mobil and keep the $78 million Mobil had paid for them, the Federal Circuit has sanctioned a major departure from *Winstar*.

CONCLUSION

For the reasons stated above, the petition should be granted.

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UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

May 13, 1999.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Dissenting opinion filed by Circuit Judge NEWMAN.

Plager, Circuit Judge.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OCS") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of Federal Claims to recover its lease rental and

up-front cash bonus payments. Marathon claimed that the legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 92-331C (Fed.Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details *See* the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, as amended, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 1331(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is

taking place on the leased tract. Lease terms grant lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state - such as

North Carolina - with a federally approved coastal zone management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)- (iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE, the implementation of which requires state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each bought 1/3 undivided interests in five North Carolina OCS leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North

Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August, 1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry

out his responsibilities under the OCSLA, *see id.* § 6003(c)(3)(A)(ii)(I). In light of the enactment of the OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the requested NPDES permit and any implementation of the POE.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OPBA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's

bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub.L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease

terms, the court found that the Government had a duty to consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.' " *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OSCLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in Winstar Corp. v. United States, 64 F.3d 1531 (Fed.Cir.1995), *aff'd*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OSC leases by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights - exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. *Id.* In addition, the court determined that the related theory of unmistakability

was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment - and neither party argues there are - our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS lease provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act ...; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all

> regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, ...; and all other applicable statutes and regulations.

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the

leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' rights to exploration, development, and production were conditioned upon obtaining the necessary federal and state approvals.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program ... unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan ... or the Secretary of Commerce makes ... [such a] finding....

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its

objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California*, 464 U.S. 312, 341, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses.

Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity was caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 804-06 (Ct.Cl.1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to express compliance with extant coastal zone management

programs. Under the circumstances of this case, to treat Marathon's failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of any exploration of the North Carolina OCS and any development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Unit POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this

issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

B.

Appellees argue that even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their contention, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334(a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)- (2). Those sections are not applicable to the case before us, and Marathon does not claim that they are.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to

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[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. *See Mobil Oil Exploration v. Brown*, 920 F.Supp. 1 (D.D.C.1996).

"comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production ...; the lessee acquires only a priority in submitting plans to conduct those activities ... [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California*, 464 U.S. at 339.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox et al., *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 SUP.CT. ECON. REV. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* THOMAS J. TOUHEY ET AL., 4

GOVERNMENT CONTRACTS § 28.40[2], at 28- 111 (1998); *cf. Sun Oil*, 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

Marathon and amici make much of the economic consequences of an adverse decision to the future of oil exploration on the OCS. Their fears are overstated, or at the least misplaced. The narrow issue in this case is the impact of the OBPA on the particular leases at issue. We conclude that the lease agreement in this case has not been breached by either party. Rather, Marathon has been unable to obtain the necessary Government approvals that would allow it to go forward with exploration of the lease site, a problem for Marathon that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed. This is not a case of a supervening act that makes performance impossible, but simply a playing out of the express provisions of the agreement.

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments.

CONCLUSION

The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

NEWMAN, Circuit Judge, dissenting.

This is a contract case. The Court of Federal Claims, determining that the contract between Marathon[2] and the United States was made impossible of performance by governmental action, held that Marathon is entitled to recover what it paid the government for the now-barred contract rights, $156,000,000 paid up-front.

The legal issue is not complex. When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. It was not a "failure to obtain the required permits" through fault of Marathon that barred the exploration of the Manteo tract; it was the change of government policy after the exploration rights had been sold and paid for. Marathon does not challenge the government's change of policy; nor does Marathon seek damages, or specific performance, or other interesting things. Marathon just wants its money back.

The Court of Federal Claims, applying simple contract principles, ordered the government to return this payment. My colleagues now authorize the government to keep it. That is not the law, and it is not responsible government dealing. I must, respectfully, dissent.

DISCUSSION

Marathon and the government entered into a standard exploration and development contract under the Outer Continental Shelf Lands Act, for the Manteo and an adjacent tract of the Outer Banks, 48 miles offshore North Carolina. In accordance with the Act, 43 U.S.C. '1337(b)(4) "entitle(s) the

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[2] I use "Marathon" to include both appellees, Marathon and Mobil.

lessee to explore" its tracts. That entitlement was negated when the government refused to issue the requisite permits, barring all exploration. This refusal was at the behest of North Carolina, who obtained a congressional moratorium on exploration of the Outer Banks. When this moratorium ended in 1996 the federal government refused to override North Carolina's objection, although it had that right by statute. This eliminated Marathon's exploration right. While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.

The panel majority, legitimizing the government's action, defines the issue as "the narrow issue of the impact of the Outer Banks Protection Act." That is inaccurate, for Marathon did not through this Act acquire a risk of forfeiture of its payment for exploration. Indeed, the panel majority raises no issues of "sovereign action" or other discarded theory, and simply rules that Marathon bore the risk that there would arise intractable state objections in which the federal government would acquiesce. However, the exploration of the outer continental shelf was and is within the control of the federal government. When the government tardily decided to withdraw exploration rights for the Outer Banks, contract law and fair dealing require that Marathon's payment for the right of exploration be returned. The issue is not whether Marathon can bear the risks of exploration, *see* maj. op. at 15, but whether the government shall deal fairly and legally with its contracting partners.

The panel majority appears to misunderstand Marathon's argument. For example, Marathon does not argue that every

exploration plan it might have submitted must be approved (although the Department of the Interior described Marathon's Manteo tract plan as "the most comprehensive exploration plan ever submitted to the agency"). As the Court of Federal claims recognized, the governmental obligation was to "timely and fairly consider" exploration plans that were properly submitted. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 327 (Fed.Cl.1996). The Outer Continental Shelf Lands Act set thirty days for this consideration. However, the Outer Banks Protection Act precluded action on Marathon's exploration plan during the OCSLA time frame.

The Outer Banks Protection Act was enacted after the contract with Marathon was made and paid for. These subsequent events were all outside of the control of Marathon. It is the government that prohibited performance of the contract. The common law of rescission and restitution, the statutory remedy of 43 U.S.C. § 1334(a)(2)(C), and precedent, all require remedy for this post-contract negation of the government's promise.

It is hornbook law that when a contract becomes impossible of performance through events outside the control of a party, restitution is an appropriate remedy. *See* 5 CORBIN ON CONTRACTS § 1112 at 549 (1964) ("a party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him"); RESTATEMENT (SECOND) OF CONTRACTS § 272 (discussing forms of relief such as rescission when contract performance becomes impracticable), § 264 (governmental regulation can render performance impracticable and be subject to relief), § 377 (remedy of restitution is appropriate in cases of impracticability and frustration of contractual purpose).

In addition, the Outer Continental Shelf Lands Act provides that the Secretary of the Interior can disapprove an exploration plan based on perceived harm to the

environment, and that when environmental harm or other causes of disapproval can not be avoided by the exploration, the Secretary may cancel the lease, but in such event "the lessee shall be entitled to compensation." 43 U.S.C. § 1334(a)(2)(C). Potential causes of disapproval are listed in s 1334(a)(2)(A)(i), viz., "(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment." Environmental objections were raised by North Carolina. The government has not, however, cancelled Marathon's lease, although it has rendered exploration impossible by refusing the necessary permits, despite the Interior Department's ruling that Marathon's Plan of Exploration and environmental report were "approvable in all respects." Marathon's conceded compliance with the federal environmental criteria raises, at a minimum, issues of fair dealing when state objections are relied on for withdrawal of the federal right without return of the federal consideration.

A wealth of precedent illustrate the remedies of rescission and restitution when performance of a contract is rendered impossible. *E.g.*, Stone Forest Industries v. United States, 973 F.2d 1548 (Fed.Cir.1992) (restitution of sums paid when intervening environmental legislation prevented performance of a timber contract); *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 831 (5th Cir.1971) ("The failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but it is nonetheless a failure of consideration discharging the other party from his duty to make the agreed return and giving him a right to the restitution of payments already made or other benefits already conferred.") (quoting 6 CORBIN ON CONTRACTS, § 1255); *E.H. Boly & Son, Inc. v.*

Schneider, 525 F.2d 20, 23-24 (9th Cir.1975) ("Any voluntary affirmative act of a party which renders substantial performance of his contractual duties impossible, or apparently so constitutes a total breach and warrants a suit seeking cancellation and restitution.... When one party repudiates a contract or commits a total breach thereof, the injured party has an election to pursue one of three remedies; he may treat the contract as at an end and sue for restitution, he may sue for damages, or he may sue for specific performance in certain cases.") (citations omitted).

The panel majority, authorizing the United States to keep Marathon's payment, explains that there is "no principled distinction" between payment for a right of exploration that has been performed but failed to find oil or encountered adversity such as weather, and payment for a right of exploration that has not been performed because it was prohibited by the government after it was paid for. According to the panel majority, in either case the government is entitled to retain the payment for the exploration right. This analysis is not supportable by any legal or equitable theory. What Marathon paid for was the right of exploration. Marathon bore the risk that the exploration might fail to find oil or gas, but Marathon did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

I do not fault the decision now to bar exploration of the Outer Banks; I fault the refusal to give back what Marathon paid for the right to explore the Outer Banks. Whatever the government's power to avoid its contractual obligations, this does not also entail the right to retain the consideration paid in contract. The Court of Federal Claims correctly analyzed the issues, applied the correct law, and reached a proper and just conclusion. That decision should be affirmed.

**UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT**

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

Oct. 15, 1998.

Before NEWMAN, PLAGER, and SCHALL, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Dissenting opinion filed by Circuit Judge NEWMAN.

PLAGER, Circuit Judge.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OCS") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of Federal Claims to recover its lease rental and up-front cash bonus payments. Marathon claimed that the

legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 92-331C (Fed.Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details *See* the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, as amended, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 133i(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is taking place on the leased tract. Lease terms grant lessees the

"exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state--such as North Carolina--with a federally approved coastal zone

management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)-(iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE with state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean, a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each bought 1/3 undivided interests in five North Carolina OCS leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one

exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August, 1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry out his responsibilities under the OCSLA, *see id.* § 6003(c)(3)(A)(ii)(I). In light of the enactment of the

OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the issuance of any of the requested permits or approvals for exploration.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OPBA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both

the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub.L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease terms, the court found that the Government had a duty to

consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.' " *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OSCLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995), *aff'd*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OSC leases by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights - exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. Id. In addition, the court determined that the related theory of unmistakability

was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment - and neither party argues there are - our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS lease provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act ...; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, ...; and all other applicable statutes and regulations.

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the

leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' performance included obtaining the necessary federal and state approvals for exploration, development, and production.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program ... unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan ... or the Secretary of Commerce makes ... [such a] finding....

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its

objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California*, 464 U.S. 312, 341, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the lessee's obligation under the contract to demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and approvals.

Lessees have not established that the delays that occurred in obtaining secretarial approval of the POE were caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, 804-06 (1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to

express compliance with extant coastal zone management programs. Under the circumstances of this case, to treat the denial of the POE as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective. Appellees cannot recover for this delay. *See William F. Klingensmith, Inc. v. United States*, 731 F.2d 805, 809 (Fed.Cir.1984) (stating the general rule that courts will deny recovery where both parties contribute to the delay and the contractor has not established its delay apart from that attributable to the government); *Law v. United States*, 195 Ct.Cl. 370, 385 (1971) (placing burden on contractor to show that the work was delayed due to the lack of approval); *Wunderlich Contracting Co. v. United States*, 173 Ct.Cl. 180, 351 F.2d 956, 964-65 (1965) (noting that the "proliferating effects" of the Korean war contributed heavily to the difficulties encountered and that plaintiffs failed to carry their burden in proving that the delays or extra expenses were directly caused by the Government's actions); *Commerce Int'l Co. v. United States*, 167 Ct.Cl. 529, 338 F.2d 81, 89-90 (1964) (applying the rule that "there can be no recovery where the defendant's delay is concurrent or intertwined with other delays").

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of any exploration of the North Carolina OCS and any development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to

submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Unit POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Had North Carolina concurred in the CZMA certification of the POE, and the Secretary refused to grant a permit or license due to the OBPA, then appellees' contentions might have merit because they could invoke the contract law principle that a party hindering the other's performance is considered in breach. *See Wah Chang Corp. v. United States*, 151 Ct.Cl. 41, 282 F.2d 728, 733 (1960); *see also* THOMAS J. TOUHEY ET AL., 4 GOVERNMENT CONTRACTS § 28.40 [2], at 28-111 (1998) ("When the contract requires the possession of a permit or license from a state, municipality, or other authorizing agency, any delay in obtaining such a permit or license is a matter between the contractor and the issuing authority, unless the government in some manner has caused or contributed to the delay."); WALTER H.E. JAEGER, 5 WILLISTON ON CONTRACTS § 670, at 159 (3d ed.1961). But that is not the case before us.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this

issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

B.

[3] Appellees argue that even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their contention, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334(a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)-(2). However, 43 U.S.C. § 1351(h)(2)(A) clearly states that "lessee shall not be entitled to compensation" because of secretarial disapproval of activities that "do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to ... such Act [16 U.S.C. § 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by such Act

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[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. See Mobil Oil Exploration v. Brown, 920 F.Supp. 1 (D.D.C.1996).

[16 U.S.C. § 1456(c)(3)(B)(iii)]," *see* 43 U.S.C. §§ 1351(h)(1), (h)(1)(B).

Under these circumstances, a lessee's options are to "submit an amendment to such plan, or a new plan, to the Secretary of the Interior." *See* 16 U.S.C. § 1456(c)(3)(B). Furthermore, we note that under contract section 23, it is the Government's option to cancel the lease in a situation in which the lessees did not comply with OCSLA provisions because of their failure to obtain state concurrence.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to "comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production ...; the lessee acquires only a priority in submitting plans to conduct those activities ... [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California*, 464 U.S. at 339, 104 S.Ct. 656.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox et al., *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 SUP.CT. ECON. REV. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease

system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* Touhey et al., *supra* § 28.40[2], at 28-111; *cf. Sun Oil*, 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

CONCLUSION

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no other evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments. The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

PAULINE NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the reversal of the relief granted by the Court of Federal Claims. Although I agree that the United States did not breach this contract by deliberate acts in its derogation, as in the *Winstar* cases, it

can not be gainsaid that the contract was made impossible of performance, whether as a matter of legislation, discretion, federalism, or politics, due to the continuing intervention of the State of North Carolina. In such case the contract was voided without the fault of either party, and Marathon and Mobil are entitled to relief in rescission and restitution. That is all the relief that was granted by the Court of Federal Claims. I would affirm the judgment of that court.

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-331C

CONOCO INC.,
Plaintiff,

AMERADA HESS CORPORATION, *ET AL.*,
Third-Party Plaintiffs,

v.

The UNITED STATES,
Defendant.

Decided: April 1, 1996

The Opinion previously issued on March 14, 1996, is withdrawn and is substituted by the Opinion issued this date.

Before ROBINSON, Judge

OPINION

ROBINSON, Judge:

This matter originally came before the court on defendant's motion for summary judgment, Conoco Inc.'s ("Conoco") cross-motion for partial summary judgment, and third-party plaintiffs' ("plaintiffs") cross-motion for partial summary judgment. Oral argument was held on January 31, 1995.

On June 23, 1995, and August 8, 9 and 10, 1995, the court entered judgment pursuant to the some of the parties' joint motions to dismiss and stipulations for compromise settlements, pursuant to which, the Florida and Alaska lease claims of Conoco and plaintiffs were settled. Moreover, the North Carolina claims of Shell Offshore Inc., Shell Frontier

Oil & Gas Inc., Shell Western E & P Inc., OXY USA Inc., and Conoco have also been settled. After settlement of the issues presented with respect to various oil and gas leases in the Gulf of Mexico, Bristol Bay, Alaska, and some of the leases offshore North Carolina, this case now involves only the remaining oil and gas leases granted by various government contracts to the remaining plaintiffs involving the Outer Continental Shelf ("OCS") off the coast of North Carolina, which plaintiffs purchased in competitive sales at various times in the 1980s.

In 1992, Conoco filed suit in this court alleging that certain legislative actions of defendant materially breached the contracts at issue, frustrated performance thereof, rendered such performance impracticable, or constituted a taking in violation of the Fifth Amendment of the United States Constitution. Other oil and gas companies[1] holding similarly affected leases were notified of their interests in the case pursuant to Rule 14(a)(1) and (b) of the Rules of the United States Court of Federal Claims ("RCFC"). As a result, nine of these oil companies filed suit on October 28, 1992 as third- party plaintiffs. These third-party plaintiffs included: Amerada Hess Corporation, Chevron USA Inc., Marathon Oil Company, Mobil Exploration & Producing U.S. Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., OXY USA Inc., Pennzoil Exploration

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[1] Amerada Hess Corporation, Amoco Production Co., Chevron USA Inc., Marathon Oil Company, Mobil Oil Corporation, Mobil Exploration and Producing Southeast Inc., Mobil Exploration and Producing U.S. Inc., Mobil Exploration and Producing North America Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., Odeco Oil & Gas Company, OXY USA Inc., Pennzoil Exploration and Production Company, Shell Offshore Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Inc., Texaco Exploration and Production, Inc., Union Oil Company of California.

& Production Company, and Shell Offshore Inc.. Then, on October 28, 1995, eight more oil companies filed an RCFC 24 motion to intervene. The court granted their motion, and Amoco Production Company, Mobil Oil Corporation, Mobil Exploration & Producing North America Inc., Mobil Exploration & Producing Southeast Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Exploration and Production, Texaco Inc., and Union Oil Company of California were included in the case as intervenors.

In brief, plaintiffs' complaints seek damages for breach of contract, restitution for the money paid in bonuses and annual rental payments, or, alternatively, the fair market value of the taken property. However, as will be discussed later, plaintiffs' motions do not require a ruling upon the taking issue. Defendant denies that any breach, frustration, or circumvention of the lease contracts or taking of plaintiffs' rights granted under the leases has occurred. By its motion for summary judgment, defendant seeks a ruling in its favor on all counts in plaintiffs' complaints. According to defendant, all of the government's actions were fully authorized by the lease agreements and, in any event, such actions, because of their broad public nature, have not given rise to any rights to recover compensation in damages for breach or restitution because they are shielded by the sovereign acts and unmistakability doctrines. Plaintiffs have moved for partial summary judgment on the breach of contract and restitution issues. For the reasons set forth below, plaintiffs' cross- motion for partial summary judgment is granted. With respect to defendant's motion for summary judgment on the taking issue, the court concludes that there is neither need nor sufficient evidence to resolve that issue in this opinion.

BACKGROUND

The OCS is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the

coastal waters within the jurisdiction of the individual states. 43 U.S.C. §§ 1301(a), (b), 1331(a). Coastal states assert jurisdiction over the waters and submerged lands within three miles of their coasts; the OCS extends from these boundary lines outward. Id. The federal government asserts jurisdiction over the OCS and the mineral resources found there via the Outer Continental Shelf Lands Act ("OCSLA" or "the Act"), 43 U.S.C. § 1331 et seq.[2]

I. Lease Acquisition

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[2] The OCSLA was passed in 1953 in order to establish the federal government's exclusive jurisdiction over the OCS and to foster the exploitation of the OCS's resources. Over the past forty-two years, over one hundred oil and gas lease sales have been conducted under the OCSLA and successful bidders have paid over $55 billion to the United States Treasury for the right to explore, develop and produce minerals under such leases. In 1978, Congress, in light of the country's pressing energy needs, overhauled the OCSLA and adopted a new statutory regime designed to serve a new declaration of national policy, one permitting "expeditious and orderly development subject to environmental safeguards ..." 43 U.S.C. § 1332(3) (1988). However, the 1978 amendments also established detailed procedures and criteria for the Secretary of the Interior to follow in exercising his authority to grant leases. In sum, the OCSLA provided for the expeditious and orderly development of the OCS subject to environmental safeguards under a 4-phase framework: (1) preparation of a 5-year leasing plan; (2) lease sales; (3) lease exploration; and (4) lease development and production. Also, the Secretary was granted carefully limited authority to cancel a lease upon finding that the threat of "environmental harm" outweighed the advantage of continuing activity on the lease. Because Congress recognized that "environmental" cancellations would not be the fault of the lessees, Congress supplemented the lessee's other remedies for such cancellations with a statutory compensation formula. 43 U.S.C. §§ 1334(a), 1351(e). This 1978 legislation recognized that the "basic purpose" of the new regime was to promote the swift, orderly and efficient exploitation of the country's untapped domestic oil and gas resources in the OCS.

The OCSLA authorizes the Secretary of the Interior ("SOI" or "Secretary") to sell leases to explore for oil and gas within the OCS through a competitive bidding system. 43 U.S.C. § 1337. The sale of OCS leases is a complicated multi-step process involving defined actions by the Secretary and other state and federal agencies. Among other things, the Secretary must formulate a five- year oil and gas leasing program that sets forth a schedule of proposed lease sales and indicates the size, timing, and location of leasing activity and reflecting, to the maximum extent possible, "a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a). Prior to a lease sale, the Secretary must publish in the Federal Register a call for information regarding industry interest and environmental concerns relating to the proposed sale. 43 U.S.C. § 1344(c), (f). At least six months prior to a lease sale, the Secretary must study the sale's potential environmental impacts and issue a draft environmental impact statement ("EIS") regarding the lease sale followed by a period of hearings and comments leading to the approval of a final EIS. 43 U.S.C. § 1346(a). Next, the Secretary must make a preliminary decision about whether to proceed with the sale, based on information and options collected in a Secretarial Issue Document. If the decision is to proceed, the Secretary must publish a proposed Notice of Sale in the Federal Register. Thereafter, the Secretary must formally consult with the governors of affected states concerning the proposed Notice of Sale. If the Secretary decides to go forward with the sale, he must decide on how to conduct the lease sale and publish a final Notice of Sale, identifying the blocks available for leasing and the bidding system to be used. 43 U.S.C. § 1337(a)(8). After a waiting period of at least thirty days after the invitation for bids ("IFB") has been issued, the Secretary receives sealed competitive bids on the appointed day of sale and reviews them to determine the

leases to be issued. Finally, a lease may be issued to each of the successful bidders. The Department of the Interior ("DOI") then issues OCS leases on standard, non-negotiable lease forms prepared by the DOI. Under the leases, the United States of America is the "Lessor." The "leased area" is generally a three-square mile tract. The terms of the leases usually are for five or ten years, but the terms are extendable so long as drilling or production is taking place on a leased tract. All OCS lessees must pay large cash bonuses as well as periodic lease payments for the potentially petrolific tracts they acquire. 43 U.S.C. § 1337.

In August 1981, August 1982, and September 1983, the government conducted lease Sale Nos. 56, 78 and RS-2 for fifty-three tracts off the coast of North Carolina (the "North Carolina leases"). Some of the tracts included in these sales, including several in the "Manteo" area of the OCS, were in deep water; technological and safety concerns had been voiced about leasing in that area. Plaintiffs,[3] or their predecessors in interest, paid a total of $354,658,363.80 in bonuses for the North Carolina leases and a total of $8,557,447.38 in annual rentals. Parties' Stipulations at 77-83. Of this amount, Conoco claimed that it paid $20,974,916 to purchase interests in nineteen leases offshore North Carolina and for the opportunity to explore oil and gas deposits, while third-party plaintiffs claim that they paid the government $341 million in bonuses and rentals for the leases. These leases are not adjacent to areas where production is already occurring. Accordingly, exploration of

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[3] These plaintiffs originally included: Conoco Inc., Amerada Hess Corporation, Amoco Production Company, Chevron USA Inc., Marathon Oil Company, Mobil Exploration and Producing Southeast Inc., Murphy Exploration & Production Company, OXY USA Inc., Shell Offshore Inc., and Union Oil Company of California.

the tracts is an essential first step to determination of whether the leases have any ultimate value.

Under the OCSLA's statutory scheme, after acquiring these OCS leases, a lessee had to obtain not only the DOI's approval but also that of any involved state and federal agencies before taking any further action under the leases.[4] After the Secretary's approval of a plan of exploration ("POE") and completion of successful exploration operations, but prior to any oil and gas development and production pursuant to an OCS lease, a lessee must next submit a development and production plan to the Secretary for approval. 43 U.S.C. § 1351(a)(1). The production plan must include a description of the type and location of facilities and operations to be used, "the land, labor, material, and energy requirements associated with such facilities and operations" and the environmental and safety safeguards to be used. 43 U.S.C. § 1351(a)(2). Plans must also include specific work to be performed. 43 U.S.C. § 1351(c). Before a development plan may be approved and a permit granted,

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[4] Prior to commencing actual exploration activity pursuant to a lease, each lessee had to submit for approval by the Secretary a plan of exploration ("POE"), containing a schedule of anticipated exploration activities, a description of the equipment to be used, the location of each well to be drilled, and other pertinent information. 43 U.S.C. § 1340(c)(1), (3). The Secretary is required to approve the plan within thirty days if the requirements of the OCSLA and the regulations prescribed thereunder are met. However, if the Secretary determines that the proposed activity would likely cause serious harm or damage to life, property, mineral deposits, the national security or defense, or the marine, coastal or human environment, and the proposed activity cannot be modified to avoid such harm, the Secretary may not approve the plan. 43 U.S.C. § 1340(c)(1). The state's approval under the Coastal Zone Management Act of 1972 ("CZMA") may also be required, 43 U.S.C. § 1340(c)(2), and no exploration under the leases may commence until the exploration plan is fully approved.

the state must concur with the plan under the CZMA or the Secretary must make the appropriate findings under that act. 43 U.S.C. § 1351(d). Finally, the Secretary must issue a final EIS pursuant to the National Environmental Policy Act of 1969 ("NEPA"). If the lessee's development plan fails to provide adequate environmental safeguards, the Secretary must require modification to ensure compliance.

II. Lease Terms

The critical terms of the leases at issue are substantively identical. *See* Parties' Stipulations § 124 *et seq.*, at 55ff. The leases were entered into by and between the United States as lessor and plaintiffs as lessees. The lease agreements set forth the terms of the contracts as well as the rights and privileges conferred on the lessees. First and perhaps most importantly, the lease contracts provide:

> Sec. 1. Statutes and Regulations. This lease is issued pursuant to the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462; 43 U.S.C. [§] 1331 et seq., as amended (92 Stat. 629), (hereinafter called the "Act"). The lease is issued subject to the Act; [Sections 302 and 303 of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. [§§] 7152 and 7153;] all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein; and all other applicable statutes and regulations.

See Stipulated Exhibits ("SXs") 128-180, Sec. 1.

> Sec. 2. Rights of Lessee. The Lessor hereby grants and leases to the Lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas, in the submerged lands of the Outer Continental Shelf containing approximately ... acres or ... hectares....

These rights include:

> (a) the nonexclusive right to conduct within the leased area geological and geophysical explorations in accordance with applicable regulations;
>
> (b) the nonexclusive right to drill water wells within the leased area, unless the water is part of geopressured-geothermal and associated resources, and to use the water produced therefrom for operations pursuant to the Act free of cost, on the condition that the drilling is conducted in accordance with procedures approved by the Director of the Minerals Management Service or the Director's delegate (hereinafter called the "Director"); and
>
> (c) the right to construct or erect and to maintain within the leased area artificial islands, installations, and other devices permanently or temporarily attached to the seabed and other works and structures necessary to the full enjoyment of the lease, subject to compliance with applicable laws and regulations.

See Id., Sec. 2.

In regard to performance, Sec. 10 of the leases contain a provision requiring that the lessees comply with all regulations and orders relating to exploration, development and production. The lease terms also contain a provision in Sec. 13 stating, "The Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act." Section 5 of the OCSLA does not discuss lease suspensions.

III. Post-lease Legislative Actions

The owners of twenty-one of the North Carolina leases combined their leases into a single unit, the Manteo Unit, and proposed to drill one exploratory well about forty-five miles east of Cape Hatteras. The State of North Carolina expressed strong objections to the proposed well. In July 1989, a Memorandum of Understanding ("MOU") was reached among the State of North Carolina, the DOI, and the operator of the Manteo unit (a subsidiary of Mobil Oil Corporation), which provided for a special environmental review before the DOI could act on the Manteo Unit's POE.

In August 1990, as a result of enhanced environmental concerns and the successful legislative efforts of Congressman Walter Jones of North Carolina, Congress enacted the Outer Banks Protection Act ("OBPA") as part of a more comprehensive oil spill legislation package, which came immediately prior to Mobil's submission to the Secretary of a POE for the single Manteo Unit exploratory well. A month after the passage of the OBPA, in September 1990, the DOI announced that this POE would have been approved if not for the prohibitions contained in the OBPA. The OBPA directly impacted the OCSLA and profoundly affected plaintiffs' North Carolina leases. Without amending the OCSLA, the OBPA expressly prohibited the DOI from approving any POEs or otherwise permitting exploration, production, or development of the OCS offshore North Carolina until at least October 1, 1991. Thereafter, such

activity was to be permitted only after the Secretary certified to Congress that he has "sufficient" information to carry out his responsibilities under the OCSLA in approving a submitted POE and then the Secretary was required to wait at least "45 days" of continuous Congressional session to pass before approval could occur.[5]

The OBPA also provides that before the Secretary may make a certification to Congress, an Environmental Sciences Review Panel ("ESRP") must be convened to make findings and recommendations regarding the adequacy of available environmental data, including oceanographic, ecological, and sociological data, to make decisions regarding the exploration and development of the OCS offshore North Carolina. If the Secretary's certification differs from the ESRP's findings and recommendations, the certification must

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[5] With respect to this embargo prior to October 1, 1991, the OBPA provides:

> (c) Prohibition of oil and gas leasing, exploration, and development
>
> Prohibition
>
> The Secretary of the Interior shall not--
>
> (A) conduct a lease sale;
>
> (B) issue any new leases;
>
> (C) approve any exploration plan;
>
> (D) approve any development and production plan;
>
> (E) approve any application for permit to drill; or
>
> (F) permit any drilling,
>
> for oil or gas under the Outer Continental Shelf Lands Act [ ] on any lands of the Outer Continental Shelf offshore North Carolina.

33 U.S.C. § 2753(c)(1) (emphasis added).

provide a detailed justification for the differences. Only after these steps have been taken may the Secretary approve a POE on behalf of the DOI. Moreover, even if a lessee is able to obtain the Secretary's approval of a POE, these same restrictive procedures then must be followed in order to obtain approval of a plan of development.

The report of the ESRP was not submitted until January, 1992. As of February 15, 1994, studies regarding the Manteo Unit well were still being reviewed. Approval of drilling of this single exploratory well was delayed by the OBPA from its August 1990 effective date until early 1994. All operations under plaintiffs' North Carolina leases are currently suspended, in some cases since as early as October 1988. In each instance, the lease terms have been concomitantly extended and the rental payments suspended.

CONTENTIONS OF THE PARTIES

I. Plaintiffs' Contentions

Plaintiffs complain that after paying large sums of money to acquire these leases, the enactment and enforcement of subsequent legislation, the OBPA, materially breached binding contracts, the leases, into which the United States, as a party, had entered into with them and, further, that such legislation has not only made it impossible for them to take advantage of their leases but also has interfered with the Secretary's ability to perform his contractual duties. Plaintiffs contend that because of such material breaches by defendant, including the Secretary's failure to timely consider plaintiffs' POEs under the OCSLA, which the OBPA did not expressly repeal, defendant is liable to plaintiffs for damages. In this regard plaintiffs contend that although the DOI's standard lease forms do not explicitly state the lessor's obligations regarding approval of submitted POEs, in light of the express terms of the leases and the circumstances of their sale, the lessor nevertheless is contractually bound to fairly

consider and expeditiously act upon the lessees' POEs as well as any subsequent development and production plans that might follow. Otherwise, the bargain between the lessor and lessees would be illusory and would permit defendant's unilateral forfeiture of plaintiffs' lease bonuses with impunity. They argue forcefully that this is particularly true here because the government drafted the lease terms which were not subject to negotiation. Accordingly, plaintiffs seek restitution of the money they have paid to defendant in bonuses and annual rentals. Plaintiffs do not claim that defendant's failure to approve plaintiffs' POEs and grant the necessary permits breached their lease contracts, but only that defendant's failure at least to fairly consider their plans was a material breach.

Plaintiffs argue that even if the enactment of the OBPA is viewed only as a delay in exploration, defendant still has materially breached the leases. According to plaintiffs, there is a duty of good faith implied in every contract that neither party to a contract will do anything to prevent, hinder, or delay performance of the other party to that contract. Moreover, plaintiffs say that the contracts for the exploration or production of oil and gas contain covenants that the lessor will not delay development of the leased tracts. But, in contravention of such covenants, plaintiffs maintain that defendant has deliberately prevented them from receiving any benefits from their leases for years, and that such delay, which continues to this day, constitutes a material contract breach.

In the alternative, plaintiffs also contend that the OBPA has frustrated their performance of the leases, thereby entitling them to restitution. Plaintiffs say that a party's duty to perform under a contract may be discharged where an unexpected contingency occurs, the risk of which was not allocated to either party, and which renders performance impracticable. Since the principal purpose of the leases has

been frustrated, plaintiffs argue that their lease contracts should be deemed a nullity.

In sum, plaintiffs argue that by virtue of the terms of the leases, defendant was contractually obligated at least to fairly consider plaintiffs' POEs within a reasonable time after their submission and that, because of passage of the OBPA, when the DOI was divested of its power to properly and timely consider plaintiffs' POEs and either approve or disapprove them based upon their respective merits, defendant was in breach. Plaintiffs contend that not one of the defenses defendant has interposed, including the sovereign acts and unmistakability doctrines, has merit. Accordingly, plaintiffs seek a finding of a breach of their lease contracts and a judgment awarding damages. Alternatively, plaintiffs seek contract rescission and restitution of all payments made to the government.

II. Defendant's Contentions

A. Lease Rights and Expectancies

Defendant contends that the OCS leases do not grant plaintiffs an absolute right to explore or develop the areas subject to their leases. It argues that the sale of a lease is a distinct stage of the OCS administrative process, separate from the issuance of a federal permit to explore or develop. In other words, defendant claims that plaintiffs purchased the leases knowing full well that they might never be able to exploit them. According to defendant "an OCS lease only grants its holder a priority over others to subsequently submit [sic] for federal approval plans for exploration, production, or development." Nothing in the leases, says defendant, guarantees the lessees that any of permits will ultimately be granted.

Since the leases unequivocally state they are subject to the OCSLA, its regulations, and all other applicable statutes and regulations, defendant argues that plaintiffs had notice

that the OCSLA establishes many requirements which have to be met before a permit for exploration can be granted. Defendant points out that plaintiffs were aware that the environmental impacts of their proposed activities had to be carefully studied and that their permits could be denied. Moreover, defendant says that even with approved POEs, lessees must then apply for permits to drill, which also require vast amounts of technical data, compliance with other acts, regulations and state and other environmental laws.

Defendant denies that it has breached any of the lease contracts or taken any property interest of plaintiffs and moves for summary judgment on all counts, including whether there has been a taking of plaintiffs' property interest in the North Carolina leases. Defendant essentially argues that plaintiffs' defined rights and expectancies as set forth in the lease agreements were extremely limited and that all actions taken by the government, i.e., enacting the OBPA and suspending the leases, were all contemplated by the lease agreements themselves. According to defendant, it has not breached the lease agreements because it has only suspended the leases and the regulations incorporated into the leases permit lease suspensions.

B. The effect of the OBPA suspensions

Defendant argues that the OBPA suspensions neither breach nor frustrate the purpose of the lease contracts. In this regard, defendant states that only three POEs were ever submitted for DOI approval by certain of the plaintiffs holding North Carolina leases.[6] Thus, defendant argues that

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[6] Third-party plaintiff Chevron submitted and subsequently received DOI approval of its POE but never took further steps to explore its tract. Arco Exploration Company also received DOI approval of its POE along with North Carolina's concurrence but never actually explored its tract either.

the OBPA did not bar exploration and development from ever occurring, but only imposed certain additional requirements on the DOI before it could approve a drilling permit. Further, defendant argues that plaintiffs have suffered no material harm due to the suspension of the North Carolina leases and the delayed CZMA review process for the Manteo Unit, because even if there were no OBPA, the status of plaintiffs' POEs would be no different than they presently are. According to defendant, plaintiffs cannot recover damages due to a delay unless that delay is solely attributable to defendant's unauthorized, improper acts which, according to defendant, have not occurred. Defendant argues the delay in implementing the pending POE for the Manteo Unit has actually been caused by plaintiffs' own inability to obtain CZMA concurrence from North Carolina. Defendant contends that suspension of the North Carolina leases is consistent with the terms of the leases. It says that the OBPA states that if insufficient information exists regarding the impact of oil and gas operations on the North Carolina OCS, the DOI must engage in further environmental review. Additionally, defendant argues that the OBPA is contemplated under the leases because it is "an applicable statute" as described in the leases here at issue.

Defendant argues that, in any event, the sovereign acts and unmistakability doctrines shield the government from liability.[7] Finally, defendant argues that plaintiffs did not

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[7] The sovereign acts doctrine shields the United States from liability for a breach of contract when federal legislative or executive actions interfere with a governmental contract when the interfering governmental action is "public and general." The unmistakability doctrine, which is closely tied to the sovereign acts doctrine, says that the government contractually waives neither its sovereign immunity nor its sovereign power to legislate, regulate, or tax unless that power is surrendered in "unmistakable terms."

possess any expectancies that could be taken and, even if they did, the government's actions with respect to the North Carolina leases fall short of a taking in violation of the Fifth Amendment.

In sum, Defendant counters that plaintiffs' rights and expectancies as defined by the lease agreements were extremely limited, that all actions taken by defendant, i.e., suspending the leases, were contemplated by or specifically allowed by the plain meaning of the lease contracts, that the OBPA's added restrictions and the extent that plaintiffs' rights were limited thereby were shielded by the sovereign acts and unmistakability doctrines and that no taking has occurred in violation of the Fifth Amendment by virtue of passage of the OBPA.

DISCUSSION

Summary judgment pursuant to RCFC 56(c) is the appropriate means for disposing of a case or issue in which the movant or cross-movant is entitled to judgment as a matter of law and there are no genuine issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The standard for whether there is a material issue of disputed fact is whether a reasonable finder of fact could return a verdict in favor of the non-movant. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed.Cir.1987). In determining entitlement to summary judgment, the court may look beyond the pleadings to determine in which party's favor the questions of law will be resolved and whether any apparent issues of fact are merely illusory.

I. Contract Interpretation

A. Generally

Breach of contract is the central issue presented by the parties' respective motions for (partial) summary judgment. In order to decide this issue, as a threshold matter, it is necessary to ascertain the exact meaning of the contract terms, which define the parties' rights, liabilities, and responsibilities. Thus, in this case, contract interpretation necessarily precedes breach analysis. The purpose of contract interpretation is to crystalize the parties' objectively manifested intent, and this may involve interpretation of specific language or terms, explanation of ambiguities, risk allocation, and sometimes the consideration of extrinsic evidence for limited purposes. As stated by the Federal Circuit recently, the "principal objective in deciding what contractual language means is to discern the parties' intent at the time the contract was signed." *Winstar Corp. v. United States*, 64 F.3d 1531, 1540 (Fed.Cir.1995) (emphasis added). Contract interpretation, a question of law properly disposed of on summary judgment, *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed.Cir.1984), may be inextricably intertwined with underlying questions of material fact. *Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed.Cir.1988). Although the Federal Circuit normally reviews this court's factual determinations for clear error and contract interpretations based thereon de novo, *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed.Cir.1993), summary judgment may only be granted on those issues presenting no questions of material fact. The process of deciding a motion for summary judgment involving issues of contract interpretation seldom lends itself to a linear analysis.

> Courts and boards follow no predetermined, well-defined analytical framework when giving a contract meaning through the interpretive process. One cardinal rule, however, is to seek to ascertain a single

> interpretation of the contract that reflects the parties' intent. This is generally done by using an objective standard to give a contract its legally enforceable meaning.... This process of interpretation is fluid rather than rigid.... If a 'clear' interpretation is found, analysis ends; otherwise, a circuitous evaluation of the other factors may ensue.

JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 143-44 (3d ed. 1995).

B. Interpretation of the North Carolina Lease Contracts

Before determining whether defendant has breached certain terms of plaintiffs' lease contracts, the court must first attempt to ascertain the exact meaning of the relevant lease terms. If these terms are clear and unambiguous, the court's process of interpretation in order to identify the objectively manifested intent of the parties is less arduous. If, however, the relevant terms are ambiguous, then contract interpretation becomes more complex and the court must use various interpretative tools, which allow the court to carve a path through the thorny entanglements of contract language. *See* CIBINIC & NASH, ADMINISTRATION 143-44 (3d ed. 1995).

1. Objectively Manifested Intent & Plain Meaning

Although the federal government's procurement procedures are carefully governed by statute and regulation, the formation and administration of government contracts are, for the most part, consonant with the principles of common law contracts. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411, 68 S.Ct. 123, 124-26, 92 L.Ed. 32 (1947) (citing *United States v. Standard Rice Co.*, 323 U.S. 106, 111, 65 S.Ct. 145, 147, 89 L.Ed. 104 (1944)). To the extent

that the Uniform Commercial Code ("U.C.C.") is not inconsistent with federal law, it is also commonly used to provide guidance in determining the rights and liabilities of the parties to a public contract. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 151 (2d ed. 1986). While Title 41 of the United States Code ("U.S.C.") and Title 48 of the Code of Federal Regulations ("C.F.R.") set forth special procedures and standards unique to contracts involving the government and a private contractor, the vast body of contract law contains universal principles applicable to all contracts, including those covered by the U.S.C. and C.F.R. Such principles provide invaluable guidance in contract interpretation. Contract interpretation is the process through which the objectively manifested intent of the parties as to what exactly they bargained for is determined. RESTATEMENT (SECOND) OF CONTRACTS §§ 200, 201 (1981). Contract interpretation constitutes an objective test; the standard is what a similarly situated reasonably prudent contractor would have understood the contract language to mean, not what the drafter or any other party subjectively intended the contract to mean. *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed.Cir.1988); *Badgley v. United States*, 31 Fed.Cl. 508, 511 (1994). If the intent of the parties can be discerned from the contract language as a whole and the parties' underlying purposes for entering into the contract, this interpretation will control. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 201, 202 (1981).

The intent of the parties to the leases here at issue may be readily ascertained from the language of Sec. 1 and a careful reading of the contracts as a whole. Such an analysis suggests a plain meaning interpretation. The clause referring to "all other applicable statutes and regulations" makes no mention of future or subsequent legislation which might

affect the lessees' rights and the procedures for submission of POEs. Within that same section, however, the drafters were explicit when they intended to call attention to future or subsequent action. For example, with respect to the applicable regulations, the drafters explained that they meant those regulations "issued pursuant to the statute and in existence upon the Effective Date of this lease" and "regulations issued pursuant to the statute in the future." Unquestionably, the drafters knew how to specify, and thereby expressly put the lessees on notice of, future or subsequent legislation because they did exactly that in connection with future regulations. In other words, the lessor, the government, in its use of the diction it selected in these leases, knew exactly what they wanted to encompass and what they wanted to omit. This supports application of the well-recognized maxim of legal interpretation, expressio unius est exclusio alterius, the expression of one thing is the exclusion of another. "Where certain things are specified in detail in a contract, other [terms] of the same general character relating to the same matter are generally held to be excluded by implication." *Nicholson v. United States*, 29 Fed.Cl. 180, 196 (1993) (citing GROVER C. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 105, at 164 (1947)); *United Pac. Ins. Co. v. United States*, 204 Ct.Cl. 686, 692, 497 F.2d 1402, 1405 (1974). It is a "well accepted and basic principle [of contract interpretation]" that, wherever possible, contracts must be interpreted to give reasonable meaning to all provisions of the contract; such an interpretation is always preferable to one which collapses parts of the contract into meaningless or superfluous redundancy. *Fortec Constr. v. United States*, 760 F.2d 1288, 1292 (Fed.Cir.1985); *Reliable Bldg. Maint. Co. v. United States*, 31 Fed.Cl. 641, 643 (1994); *Sharpe Refrigeration, Inc. v. United States*, 30 Fed.Cl. 735, 738 (1994). To hold that application of the OBPA was within the objectively manifested intent of the parties to the North Carolina leases,

as defendant suggests, would mean that the provisions in Sec. 1 should be read to include not only all future or subsequent regulations but also statutes. This would render the labored language, "in existence upon the Effective Date of this lease" and "issued pursuant to the statute in the future," unnecessary, ineffective, and confusing. This is precisely the result courts strive to avoid, and in this case, there is neither need nor justification to endorse this interpretation. Indeed, to read this language, as defendant would have the court do, injects ambiguity and confusion where none would otherwise exist.

Moreover, defendant's argument that the leases may be interpreted to include future or subsequent statutes and their related regulations is inconsistent with the underlying purpose of these lease contracts, which was to promote the discovery of new hydrocarbon resources. This underlying purpose provides further support for the interpretation that the parties' agreements covered only existing statutes and related present and future regulations specifically promulgated pursuant to the OCSLA for administering oil and gas exploration. Plaintiffs entered into these oil and gas leases, which are not materially different from many similar leases that had previously been entered into with many oil companies for the opportunity to explore and develop the petroleum resources of the OCS both offshore North Carolina and in other areas. The court's reading of the language of these leases indicates that at the time such leases were executed, none of the parties to these leases anticipated or envisioned the enactment of the OBPA or any similar legislation approximately nine years later.[8] In the early '80s,

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[8] Plaintiffs' contention that because the leases were defectively formed, i.e., with no meeting of the minds, the parties never reached a binding agreement is not persuasive. This contention is essentially a non- issue in this case because the (...continued)

neither the government nor plaintiffs had any inkling that the OBPA would be enacted. The facts show that only after passage of the OBPA did defendant broaden its interpretation of the scope of the lease agreements' conditions. Contract terms should be interpreted without "regard either to the probable intention of the parties contracting, or to the probable changes which they would [have] made in their contract, had they foreseen certain contingencies." WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 639, at 562 (2d ed. 1847).

Defendant's position, that under OCSLA plaintiffs paid consideration for the mere possibility of exploiting limited and uncertain contractual rights is technically correct. Unquestionably, the Secretary, based upon a legitimate and factually supported finding of harm to the environment--i.e., a fair exercise of discretion--may disapprove POEs. However, the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation. Moreover, the government's further restriction of the lessees' rights, by simply legislating away the SOI's ability to consider plaintiffs' POEs, is not a right granted to the government, either expressly or impliedly by these leases. Such a broad and totally nullifying right simply cannot be found within the language of the leases. No provision in plaintiffs' leases even alludes to the government's claimed ability to unilaterally modify or circumvent, with impunity, long established and respected POE approval and permit acquisition procedures established

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undisputed evidence shows that each of the parties reached an explicit agreement with the government and that there was mutual assent as to the scope of their respective rights and liabilities.

under OCSLA. Sec. 13 of the leases states only that the government could suspend or cancel the lease agreements as provided by § 5 of the OCSLA but would nonetheless have to pay compensation as required by that Act. Actually, Section 5 of the OCSLA does not discuss suspension of oil and gas leases. However, other portions of that Act provide that the lessor may suspend the leases "if there is a threat of serious, irreparable, or immediate harm or damage to life ... to property ... or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1). The accompanying regulations to the OCSLA confirm this suspension power but state that no such suspension should exceed five years unless it is properly extended. 30 C.F.R. § 250.10.

Accordingly, based upon the plain meaning of the terms of the leases issued in conformity with the OCSLA and all regulations applicable thereto, this court holds that the parties' objectively manifested intent revealed in the above provisions of the leases, precludes finding merit in defendant's interpretation of the leases. In short, the court is convinced that such a significant and external factor, as the OBPA undeniably is--one which would clearly reduce the value and materially alter the structure and framework of plaintiffs' North Carolina lease acquisitions and permit approvals, whether by abating the SOI's authority to consider the same or otherwise--cannot be read into these unambiguous lease terms. Moreover, common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptable drilling rights. Plaintiffs acted responsibly in their purchase of these leases because the sums of money they paid were for the exclusive right and privilege to drill for, develop, and produce hydrocarbon resources in the leased areas during a specified initial period

if they met the requirements of the OCSLA and its implementing regulations. Clearly, had any legislative embargo to the approval process been in the contemplation of the parties at the time of entry into the leases,[9] common sense leads to the conclusion that plaintiffs' winning competitive bids undeniably would have been less, perhaps significantly less.

2. Other Considerations

Plaintiffs urge this court to consider the weight of certain out of court statements set forth in plaintiffs' volumes of exhibits. Contract interpretation may be aided by other considerations,[10] including an examination of the

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[9] Defendant's legislative actions are inconsistent with the North Carolina leases in that the OBPA evaded the spirit of the bargain by compelling interference with or failure to cooperate in a party's performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981); U.C.C. §§ 1-201(19), 1-203. In the present case, defendant's obligation and ability to consider and possibly approve plaintiffs' POEs was fundamental to contract formation and performance. The government's enactment of the OBPA was, as plaintiffs contend, designed to politicize and indefinitely stall the DOI's normal procedures for consideration of POEs, thereby effectively barring the parties from performance of their respective duties under the North Carolina leases through a mechanism beyond the bounds of the contracts' terms. While this may, on the one hand, bring into question defendant's implied duty of good faith and fair dealing--though not necessarily by the SOI, which as an agency established by Congress is bound to follow Congressional dictates--this court need not decide that question because of the court's independent findings discussed above.

[10] The court determines that the North Carolina leases are clear and lend themselves to a plain meaning interpretation. Although the terms referring to "future and subsequent regulations" may have required interpretation, this need for construction does not amount to an ambiguity. If, for the sake of argument, the terms of the contract have some degree of ambiguity, any such ambiguity would be latent and the doctrine of (...continued)

contra proferentem, a firmly established doctrine of contract interpretation that places the risk of unfavorable contract interpretation on the party who drafted and proffered the contract provisions in question, would apply. United States v. Seckinger, 397 U.S. 203, 216, 90 S.Ct. 880, 887, 25 L.Ed.2d 224 (1970); United Internat'l, 33 Fed.Cl. at 370; CIBINIC & NASH, ADMINISTRATION 220-21 (3d ed. 1995). Even if the contract provisions here at issue were ambiguous, the interpretation would remain the same. When contract language is ambiguous, "that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

Application of this doctrine is predicated on the requirement that the non- drafter's interpretation be reasonable, *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed.Cir.1987), and mandates that latent ambiguities be construed against the drafter, the party with the responsibility and opportunity to reduce the agreement to a coherent, unambiguous, written instrument. *See Orange Cove Irrig. Dist. v. United States*, 28 Fed.Cl. 790, 799 (1993); *Gaston & Assocs., Inc. v. United States*, 27 Fed.Cl. 243, 247 (1992). The one exception to the application of contra proferentem is that the non-drafting party must neither have known nor had reason to know of the ambiguity; i.e., regardless of the reasonableness of the non-drafter's interpretation, the ambiguity must not have been glaring or so obvious as to invoke the non-drafter's duty to inquire. *Reliable Bldg.*, 31 Fed.Cl. at 644. Interpretation of ambiguous contract terms against the drafter is even more favored when the government dictated the provisions of the contract. *United States v. Seckinger*, 397 U.S. at 216, 90 S.Ct. at 887 (reasoning that the drafting party, the government, had "vast economic resources and stronger bargaining position in contract negotiations"); *Kiewit Sons' Co. v. United States*, 109 Ct.Cl. 390, 418, 1947 WL 5089 (1947) (stating that "[t]his rule is especially applicable to Government contracts where the contractor has nothing to say as to the provisions."); *see also North Star Alaska Housing Corp. v. United States*, 30 Fed.Cl. 259, 268 (1993).

In this case, the government controlled the terms in these and many similar oil and gas leases. Any textual uncertainty was not immediately identifiable, and thus, did not trigger a duty of (...continued)

circumstances surrounding formation, even though such circumstances may not have been included within the four corners of the instrument itself. There are, however, limits to such considerations. The parol evidence rule, a rule of substantive law rather than evidence, bars the introduction of extrinsic evidence antecedent to or contemporaneous with contract formation for the purpose of adding to, subtracting from, varying, or contradicting the terms of a written contract, which is final, complete, unambiguous, and unaffected by mistake, fraud, or accident. *California Sand & Gravel, Inc. v. United States*, 22 Cl.Ct. 19, 25 (1990). That is, where a contract is explicit and its terms unambiguous, the court is not at liberty to search for its meaning beyond the four corners of the instrument itself, and the use of auxiliary tools of contract interpretation, including extrinsic evidence and post-formation circumstances, is impermissible. *Nicholson*, 29 Fed.Cl. at 193-94; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 27 Fed.Cl. 275, 290 (1992). Nonetheless, certain extrinsic evidence may be used for the limited purpose of explaining the circumstances affecting a contract by shedding light on the parties' objective intent. *Kmart Corp. v. United States*, 31 Fed.Cl. 677, 681 (1994). However, contract interpretation, with or without extrinsic evidence, may never be used to discern the unilateral subjective intent of one or more of the parties. *Alaska American Lumber Co. v. United States*, 25 Cl.Ct. 518,

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inquiry by plaintiffs. Application of contra proferentem would require that the provisions of Sec. 1 be construed so as not to include future and subsequent legislation. This conclusion is consistent with the other interpretive tools of contract construction, discussed above, and leads this court to conclude that, although the United States could certainly wield its sovereign power in enacting the OBPA, that act, nonetheless, may not retroactively be applied to the North Carolina leases without regard to and in derogation of plaintiffs' existing rights under the leases.

528 (1992); *see E.I. Du Pont De Nemours and Co. v. United States*, 24 Cl.Ct. 635, 638 (1991). Further, the significance of extrinsic evidence regarding events occurring after contract formation may be considered to determine whether they constitute modifications to the underlying contract. *Walter Dawgie Ski Corp. v. United States*, 30 Fed.Cl. 115, 126 (1993); *California Sand*, 22 Cl.Ct. at 26. Extrinsic evidence, however, must be distinguished from post-formation evidence that is more probative of subsequent events affecting the contract than of contract interpretation. Plaintiffs' voluminous post-lease moratoria exhibits ("PPLMX"), specifically testimony regarding the OBPA's effect on the North Carolina leases, fall into this latter category and do not qualify as extrinsic evidence that may be used for the purpose of contract interpretation.

The statements made by DOI officials regarding the OBPA are of little value in ascertaining the meaning of the contract terms. They amount to neither extrinsic evidence probative of the parties' understood agreement nor contract modifications. Rather, these statements only constitute one form of legislative history. As far as the North Carolina leases are concerned, these statements occurred after the fact, i.e., after contract formation. Testimony by DOI officials to the effect that obstruction of exploration and development of oil and gas offshore North Carolina through enactment of H.R. 3861, the OBPA, "circumvent[s] the nationwide provisions and standards of the OCS Lands Act" provides little support for plaintiffs' interpretation that the OBPA was not within the scope of the contracts at issue. *Review of Offshore Oil and Gas Programs & Laws, Oversight Hearings on H.R. 3861 Before the Subcommittee on Water, Power, and Offshore Energy Resources of the H.R. Committee on Interior & Insular Affairs*, 101st Cong., 2d Sess. 56 (1990) (testimony of Edward Cassidy, Deputy Director, Mineral Mgmt. Serv., DOI). Moreover, the statements of DOI

officials to the effect that "once you issue a lease and then if the government doesn't want to drill there, you find reasons why not, then you have a 'taking' and you've got to buy it back" do not conclusively establish that the bargain struck by the parties did not include a government safety valve through which subsequent legislation could flow, effectively barring oil and gas exploration offshore North Carolina. *DOI & Related Agencies Appropriations for 1990, Hearings Before the Subcommittee on the DOI & Related Agencies of the H.R. Committee on Appropriations, House Appropriations Hearings*, 101st Cong., 1st Sess. 379 (1989) (statement of Manuel Lujan, Jr., SOI, DOI).[11]

To some extent, this court can accept plaintiffs' interpretations of the DOI officials' statements regarding the OCSLA leasing program and the effect of the OBPA thereon. Further, it is logical to conclude, as the court has discussed, that subsequent legislation that binds the key agency

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[11] With regard to the Florida and Alaska leases, Secretary Hodel of the DOI stated that exploration "moratoria" would "deny the rights of an oil and gas lease," take away the "contractual integrity" of the leases, and might constitute "act[s] of bad faith on the part of the Federal Government." PPLMX # 10. Secretary Lujan of the DOI observed that such moratoria would be "breaking faith" with the lessees. PPLMX # 21 at 379. Assistant SOI Griles stated that lease restrictions were "inconsistent with the rights of the lessees under their leases" and could constitute "bad faith on the part of the United States." PPLMX # 76 at 16, 35-36. Similarly, Assistant SOI O'Neal stated that the OBPA was "inconsistent with the terms of the leases" and "put the good faith of the Federal Government in question when post-lease restrictions are imposed on existing leases." PPLMX # 77 at 19, 44-46, 56, 87. The moratoria then at issue included the October 1988 Southwest Florida Leases Appropriations Ban, the October 1989 Bristol Bay Leases Appropriations Ban, the June 1990 Presidential "Off Limits" Decree affecting the Southwest Florida Leases, and the August 1990 enactment of the OBPA resulting in the instant litigation.

official's previously existing power to perform under a government contract may amount to a material breach of contract. The court cannot completely ignore the fact that these statements, uttered by high-level agency officials contemporaneous with passage of the OBPA, generally support plaintiffs' interpretation of the leases vis a vis the OBPA. Nevertheless, these statements, which are in the nature of admissions against interest, were made during the OBPA (H.R. 3861) hearing process and may reflect, arguendo, only a small cross-section of the DOI and Congressional membership, do not unambiguously explain the proper interpretation of the North Carolina lease terms. In any event, caution must be exercised when referring to statements found in the legislative history, whether they are made by legislators or lobbyists, to glean the intent of Congress vis a vis legislation. *Thompson v. Thompson*, 484 U.S. 174, 191-92, 108 S.Ct. 513, 522, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977). Even greater caution must be used, then, when referring to such evidence to interpret the terms of contracts that were formed many years before the enactment of subsequent legislation, whether or not such legislation has apparent impact upon such contracts.

II. Breach of Contract

A. The Contracts at Issue

To determine the merits of plaintiffs' claims for breach of contract, the court turns to the lease agreements in question, relying on the meaning ascertained through contract interpretation.[12] Under the lease agreements, plaintiffs paid

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[12] Although plaintiffs briefly argue that recovery be predicated on the doctrines of impracticability of performance and frustration of purpose, respectively, the case at (...continued)

large sums of money for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources...." The leases, however, are subject to the OCSLA and regulations issued pursuant to it, and, as defendant points out, do not guarantee that plaintiffs will be able to explore and develop the lease areas. Under the existing regulations, plaintiffs must obtain numerous federal and state approvals and certifications before they may explore and ultimately develop the leased areas. However, it is plaintiffs' inability to take part in this regulatory process as a result of the OBPA's restriction on the SOI's approval powers that is at the heart of their claim. Plaintiffs do not claim that defendant is in breach because it has not approved an exploration plan. Rather, they claim defendant is in breach because it cannot and will not even consider an exploration plan--a necessary step in the regulatory approval process. They argue that even if the leases do not clearly state on their face defendant's obligations regarding actual approval of exploration plans, there can be no doubt that defendant is contractually obligated at least to consider them. The court agrees.

The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to "comply with all regulations and orders relating to exploration." Under the OCSLA and its

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bar does not turn on these theories of risk allocation and excuse of performance. Impracticability applies in scenarios where performance becomes unduly and exceptionally burdensome due to some usually unforeseeable change of circumstances. Frustration applies where unforeseen supervening events, the non-occurrence of which was a basic assumption to the venture, deprives a party of all contractual benefit and utterly defeats the purpose of performance, although there is no actual impediment to performance. The court finds it unnecessary to decide whether these theories of risk allocation lie in light of its breach of contract analysis.

regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. The necessary reciprocal obligation is that the government will timely and fairly consider--not necessarily approve, but at least promptly consider--exploration plans properly submitted. Indeed, the OCSLA mandates that the Secretary "shall approve" exploration plans within thirty days unless determined that the plan "would probably cause serious harm or damage" and the plan could not be modified to avoid such harm. 43 U.S.C. § 1340(c)(1). If, as defendant contends, the government were under no obligation to consider facially compliant explorations plans, plaintiffs' purchases would have been an empty one. It is undisputed that obtaining an approved POE is necessary to plaintiffs' exploitation of their leases. Given the past course of dealing between petroleum companies and the DOI pursuant to earlier leases granted under the OCSLA, it seems apparent that plaintiffs would not have paid millions of dollars in bonuses and rents, if defendant's interpretation of the lease agreements is correct. As already noted, under the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Defendant relies heavily upon the Supreme Court's explanation of the OCS leasing process in *Secretary of Interior v. California*, 464 U.S. 312, 104 S.Ct. 656, 78

L.Ed.2d 496 (1984), to argue it was not at all contractually obligated to act on submitted exploration plans. When discussing OCS leases similar to the ones at issue in this case, the Court in California noted that:

> OCS lease sales are conducted by the [DOI]. Oil and gas companies submit bids, and the high bidders receive priority in the eventual exploration for and development of oil and gas resources situated in the submerged lands of the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

464 U.S. at 317, 104 S.Ct. at 659. But it is the Court's further characterization of the lessees' rights under the leases that defendant cites to show that plaintiffs do not have the rights they assert. The Court stated that OCS lessees receive only "priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." 464 U.S. at 337, 104 S.Ct. at 669. This is, of course, true, and plaintiffs do not contest this. However, it does not follow that the government may then short circuit the entire regulatory process by retracting the SOI's powers to consider submitted plans of lessees whatever their status vis a vis other potential lessees. It is here that plaintiffs' and defendant's interpretations part, for defendant refuses to recognize that the reciprocal rights granted to the parties under the contracts at issue provide that submission of plaintiffs' POEs is predicated on an unequivocal governmental duty to timely and fairly consider, though not necessarily approve, them. The power of approval is, as noted, the SOI's. *See* 43 U.S.C. § 1340(c)(1).

Having found the government contractually obligated to, at the very least, timely and fairly consider plaintiffs' POEs,

it is an inescapable conclusion that defendant's failure to do so constitutes a breach. Defendant does not dispute that as a result of the OBPA, it cannot consider plaintiffs' POEs under the North Carolina leases. Since defendant is now legislatively barred from performing, it is in breach. It is not necessary for plaintiffs to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA.

Defendant makes many counter-arguments as to why it is not in breach. None of these arguments directly address the central aspect of its breach. Defendant's strongest response is that it is not in breach because its obligation to consider POEs has not come due. Defendant argues that it has suspended the leases, action defendant claims is allowed by the leases themselves, and concomitantly extended the lease terms so it does not have to consider any POEs. In this respect defendant argues, the regulations to which the leases are subject allow the defendant to suspend the leases. Because the leases have been suspended all obligations under the leases, i.e., paying rent and considering exploration plans, have likewise been suspended. Thus, defendant argues that because its obligations under the leases have also been suspended, it is not in breach. Plaintiffs do not challenge the government's authority or ability to suspend the leases but argue convincingly that, in this case, the suspensions were not effected in accordance with the applicable lease terms.

Of course, if the leases had actually authorized the suspensions here imposed, defendant would not be in breach. In that case, plaintiffs' rights to have POEs considered would likewise be suspended. That, however, is far from the case. The leases contain a provision relating to suspending the leases, according to which "[t]he Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act."

Perhaps more importantly, the leases indicate that they are subject to the OCSLA, all regulations promulgated thereunder, and all applicable statutes then-existing, which this court has determined does not include subsequently enacted legislation such as the OBPA. Thus, the extent to which the suspensions were proper under the terms of the lease contracts depends on whether such suspensions occurred pursuant to the OCSLA and its regulations. Plaintiffs argue that the denial of their rights under the leases cannot be justified by defendant's authority under the OCSLA and its regulations, because the OCSLA contemplates only "suspension" or "temporary prohibition," not open-ended, indefinite bars. Further, plaintiffs contend that, in any event, suspensions are justified only under defined circumstances, for example, if there is a threat of serious irreparable, or immediate harm. Plaintiffs argue that the facts show that the government, quite to the contrary, unilaterally suspended the leases not because of any such threat of harm, but rather because of the OBPA.

Under the OCSLA the Secretary can establish regulations:

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease ... if there is a threat of serious irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment....

43 U.S.C. § 1334(a) (emphasis added). The Secretary set forth regulations concerning suspension of the leases at 30 C.F.R. § 250.10, which sets out the situations under which the OCS leases may be suspended. Defendant attempts to justify its suspension actions under these regulations.

Section 250.10(a) authorizes suspensions when additional time is needed for such things as facilitating proper development of leases, constructing transportation facilities, entering into sales contracts, and unforeseen delays due to such things as weather. Under 30 C.F.R. § 250.10(b), suspensions are authorized for such reasons as the lessee's failure to comply with provisions of law or the lease, in the interest of national security, conducting an environmental study and threat of serious, irreparable, or immediate harm or damage. Finally, suspensions under this section should not exceed five years.

The suspension notices sent to plaintiffs invoke defendant's suspension powers under 30 C.F.R. § 250.10 but state that the suspension is necessary in order to comply with the OBPA. The notices do not point to any environmental threats, risks of harm to life or the environment, or any other justification set forth in the regulations and the OCSLA. Indeed, the June 1990 Environmental Report, "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program," determined that the proposed exploration would not result in any significant impact on the Outer Banks marine environment. Defendant now argues that, while not stated in the suspension notices, the leases were suspended to conduct further environmental studies as is authorized under § 250.10(b)(4).[13] However, such post hoc rationalizations

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[13] 30 C.F.R. § 250.10(b) provides:

> ... suspension of any operation or activity, including production, because of the following:
>
> * * * * * *
>
> (4) The suspension is necessary for the implementation of the requirements of the

(...continued)

must be viewed critically. *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 765, 572 F.2d 786, 815 (1978) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (1971)). Defendant further argues that the lease suspensions must have been consistent with the terms of the lease contracts because plaintiffs themselves have "stipulated that the 'person who executed [the] suspension order[s] [subsequent to enactment of the OBPA] on behalf of the United States possessed authority to do so." Df.'s Motion for Summary Judgment at 44. This argument is unpersuasive. Merely because it is within an official's authority to take certain action is entirely a separate issue from whether such action was properly taken. The real issue is whether the Secretary's suspension of the leases pursuant to the OBPA breached the contracts, not whether it can be justified retroactively. *See Gulf Oil Corp. v. Morton*, 493 F.2d 141, 146 (9th Cir.1973); *Union Oil Co. v. Morton*, 512 F.2d 743, 747-49 (9th Cir.1975).

The court agrees with plaintiffs that the reasons given for the suspensions were not the type contemplated by the OCSLA, and thus were neither agreed upon by plaintiffs nor incorporated into the bargain at the time of contract formation. The suspension notices state that the leases were suspended in order to comply with the OBPA. The OCSLA, however, already provided a detailed and comprehensive framework of regulatory procedures for the OCS oil and gas leasing program. The OCSLA provides that if the SOI determines that exploration plans were consistent with the OCSLA's environmental guidelines, he "shall approve" them. If not, i.e., if the plans are likely to cause serious injury to life, property, or the environment, then he shall reject them.

National Environmental Policy Act or to conduct an environmental analysis[.]

43 U.S.C. § 1340(c)(1). The OCSLA provides a coherent scheme for the OCS program, and it was that scheme only around which the parties formed their contracts. In signing the leases, plaintiffs agreed to subject themselves to the OCSLA and the regulatory scheme surrounding it, but they could not have envisioned themselves being bound by the OBPA. Plaintiffs were aware that only in certain circumstances (for example, in case of a threat of serious harm)[14] could their leases be suspended or cancelled. Indeed, in certain instances plaintiffs themselves might have requested such action. What they did not agree to, however, was that the leases could be unilaterally suspended indefinitely through a mechanism beyond the scope of the OCSLA. The parties did not contemplate at the time of formation that the leases could be suspended because, some nine years later, Congress would want to promote new policies on enhanced environmental protection by, among other actions, halting development of the OCS offshore North Carolina. This was within neither the words nor the

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[14] The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions--

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition ...

43 U.S.C. § 1334(a) (emphasis added).

spirit of the lease agreements. Thus, the court finds that defendant's actions are not justified as mere lawful, authorized suspensions of the leases but material breaches of the lease contracts.

Further evidence that the suspensions were not the type bargained for in the leases is the duration of the suspensions. Section 250.10(e) provides that the suspensions should not exceed five years. Except under limited circumstances, OCSLA establishes that leases must be suspended for five years before they may be cancelled. That the OCSLA provides a mechanism to cancel leases after a prolonged suspension period demonstrates that it only intended suspension be of a limited duration. Significantly, many of the suspension notices directed plaintiffs to this section of the OCSLA stating that the leases must be suspended for a period of five years before cancellation. The OCSLA contemplated that suspensions would be of a limited nature and not indefinite bars to exploration. The court in Union Oil, construing similar OCS leases, likewise found that a suspension "by definition possesses a 'temporary nature.' " 512 F.2d at 750. Continuing, that court acknowledged the SOI's broad suspension powers for conservation of natural resources but found, "Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will." *Id.*

Defendant's counsel admitted during oral arguments that defendant has no idea how long these suspensions will continue, that there is no evidence that the suspensions will be lifted anytime in the future, and that the United States is not waiting for the completion of any studies or the results of any tests or any additional information before acting on the suspensions. The suspension in Gulf Oil thus differs from those in the case at bar because the latter were not prompted by the SOI's imminent concerns about risks to the marine ecosystem. *See* 493 F.2d at 144-45. It seems clear that the

leases neither provide for nor even implicitly contemplate the type of open- ended, indefinite suspensions present in this case. The government's reliance on the Secretary's limited suspension powers to avoid breach of contract, therefore, is misguided and misplaced.

Plaintiffs have convinced the court that under the leases they were entitled to fair consideration of their POE's, the essential first step to exploitation of their leases. The court completely agrees with plaintiffs' interpretation of the leases that there can be no doubt that the lessor is contractually obligated to consider and act on POEs submitted by lessees regardless of the fact that the defendant's obligations are not stated definitively by express language in the leases. Again, as plaintiffs argue, an "interpretation of the leases that would allow the United States as lessor to fail to act on POEs, after requiring large up-front bonuses and lessor approval of POEs, would create an illusory bargain and permit unilateral forfeitures of lease bonuses, putting lessees entirely at the mercy of the United States." For all of the foregoing reasons, the court holds that defendant's failure, under the restrictions adopted pursuant to the OBPA, was a material breach of the leases. Accordingly, plaintiffs are entitled to a monetary recovery in this proceeding.

B. The Impact of Subsequent Legislation on a Government Contract Involving a Highly Regulated Industry

The U.S. Court of Appeals for the Federal Circuit has recently discussed the force and effect of subsequent legislation on the issue of breach of a government contract involving a highly regulated industry. In *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir.1995), cert. granted, --- U.S. ----, 116 S.Ct. 806, 133 L.Ed.2d 753 (1996), the Federal Circuit confronted some of the same issues presented by the case at bar. Indeed, the parties to this case have taken advantage of every opportunity to bring to this court's

attention the significance, or lack thereof, of the Federal Circuit's decision in *Winstar* to affirm this court's holding in that case. *See* Pl.'s Motion for Leave to File Recent Appellate Opinion, Df.'s Response, Pl.'s Reply, Df.'s Report of the Effects of the Decision in *Winstar*, and Pl.'s Response to Df.'s Report. In short, the Federal Circuit, sitting *en banc*, affirmed this court's decision that the government, by enacting the Financial Institution Reforms, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183, as codified in relevant part by 12 U.S.C. § 1464 et seq., breached its express and implied contracts with plaintiffs, the Winstar Corporation ("Winstar"), the Statesman Bank ("Statesman") and Glendale Federal Bank ("Glendale"). The Federal Circuit reasoned that where future or subsequent legislation contradicts the intent of the parties to a contract, the United States may be liable for breach under certain circumstances despite the sovereign acts doctrine. Clearly, *Winstar* is apposite. Therefore, the following, more detailed examination of the *Winstar* decision will help explain the resolution of this case.

Winstar presented a case in which financial institutions had formed express and implied contracts with the United States in the highly regulated field of banking. Originally, the plaintiffs, Winstar, Statesman and Glendale, had consolidated their actions in the Court of Federal Claims. This court found that the government had breached its contracts with the plaintiffs by enacting subsequent legislation, the FIRREA. The contracts at issue allowed the financial institutions to take advantage of special accounting treatment in their acquisition of failing thrifts. Specifically, the contracts permitted the plaintiff financial institutions to calculate a special type of goodwill, an intangible asset representing the ability of a business or financial institution to generate income due to business reputation, market position, management, technology, and other elusive

indications of earning power. In the savings and loan ("S & L") industry, "supervisory goodwill" represents the difference between the fair market values of a failing thrift's current assets and its liabilities assumed by the acquirer and is normally amortizable over a straightline basis over a number of years. Under the contracts at issue:

> The Bank Board and the FSLIC [Federal Savings and Loan Insurance Corporation] allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to have capital compliance without having to put up large amounts of its own money and without requiring large amounts of monetary assistance from the government.

Id. at 1536. In 1989, Congress responded to a financial crisis that had overcome the S & L industry by enacting the FIRREA, which significantly impacted the regulatory scheme of thrift mergers and acquisitions.

> As pertinent here, it (1) abolished the FSLIC and transferred its functions to other agencies; (2) created a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation ("FDIC"); (3) eliminated the Bank Board and replaced it with the Office of Thrift Supervision ("OTS"), an office within the Department of the Treasury and made the OTS Director responsible for the regulation of all federally insured savings associations and the chartering of federal thrifts; and (4)

> established the Resolution Trust Corporation ("RTC"), which was charged with closing certain thrifts. *See* 12 U.S.C. §§ 1437 note, 1441a, 1821.

Id. at 1538 More significantly, the FIRREA "greatly reduced the amount of supervisory goodwill that could be used to meet regulatory capital requirements." *Id.* at 1544-45 (citing 12 U.S.C. § 1464(t)).

The plaintiffs filed suit in this court alleging that the government was liable for breach of contract and an unconstitutional taking without just compensation in violation of the Fifth Amendment by restricting the availability of supervisory goodwill and capital credits to satisfy the regulatory capital requirements of the plaintiffs as previously allowed prior to the enactment of the FIRREA. *Id.* at 1539. In its defense, the government argued that plaintiffs did not have the contractual rights they alleged. More importantly, defendant, relying heavily on *Bowen v. Public Agencies Opposed to Social Security Entrapment ("POSSE")*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), challenged plaintiffs' claims by arguing that "the alleged agreements were subject to [subsequent] statutory and regulatory challenges." *Winstar*, 64 F.3d at 1539. POSSE states that " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' ... Therefore, contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation.' " POSSE, 477 U.S. at 52, 106 S.Ct. at 2392 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147-48, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982)). In support of its position, the government cited a clause in the contract reading, "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties

hereto." *Winstar*, 64 F.3d at 1542. Defendant argued that the Winstar plaintiffs "impermissibly sought to enjoin Congress' power to legislate and the agencies' power to regulate."[15] *Id.* The Federal Circuit disposed of these arguments by reasoning that the government's POSSE arguments " 'mischaracterized the plaintiffs' claim as one which improperly seeks to bind the government's power to regulate.' Rather, the [U.S. Court of Federal Claims] noted that plaintiffs sought only money damages, which did not implicate the government's power to regulate." *Id.* at 1545-46 (citing this court's decision with approval).

The breach of contract issues presented by the case at bar bear striking similarities to those addressed by the Federal Circuit in *Winstar*. Specifically, to what extent can the government be held liable for breach of contract when the alleged breach stems from subsequent legislation or regulation, which clashes with the terms of a public contract in a highly regulated industry or the objectively manifested intent of the parties thereto in a highly regulated industry? Although the Federal Circuit in *Winstar* did not venture to set forth a precise test, it did consider factors that help clarify whether subsequent legislation may give rise to governmental liability for breach of contract. First, the parties' objective intent, to the extent it can be crystallized from the contract terms reduced to writing, is probative of the force and effect of subsequent laws. Second, the presence of an integration clause strongly suggests that the contract was the sole embodiment of the bargain. A non-integration clause, or a clause referring to terms not found in the contract

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[15] The government also asserted the sovereign acts doctrine and the unmistakability doctrine as defenses, claiming that they precluded any recovery by plaintiffs for governmental breach of contract. *Winstar*, 64 F.3d at 1539. These doctrines are discussed *infra* at III. Other Defenses.

document, therefore, is evidence that the agreement is subject to external conditions or requirements, whether statutory, regulatory, or otherwise. Third, if the contract on its face would subject one or more of the parties to "regulatory noncompliance and penalties" when read in light of the subsequent governmental action in question, it would defy reason to hold the agreement subject to such an outright restriction. Finally, the Federal Circuit reasoned that a prior agreement, when contradicted by subsequent legislation, does not constitute a mere statement of "then-current prosecutorial and regulatory policy" once the parties have become bound by specific terms through mutual assent. *Id.* at 1541-42.

In this case, the first of these considerations supports plaintiffs' position that the subsequent legislation here at issue, the OBPA, violates the North Carolina leases. The objective intent of the parties seems clear--plaintiffs paid the oil and gas lease bonuses and rental payments in consideration for at least the opportunity to explore and develop the OCS. As plaintiffs point out, no one would pay such an exorbitant premium for interests that could potentially be rendered worthless, and that is in effect what the OBPA accomplishes by prohibiting the approval of any exploration, development, or production plans, nor any application for permit to drill until the later of October 1, 1991, or 45 days of continuous Congressional session following "submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel." 33 U.S.C. § 2753(c)(1). To the extent the parties' intent sheds light on the applicability of subsequent legislation, it is most doubtful that they intended that the North Carolina leases be governed by future or subsequent legislation such as the OBPA, which was enacted approximately seven years after the last disputed contract was formed.

The second *Winstar* consideration, the inclusion and scope of an integration or non-integration clause, may shed light in the case at bar on whether the disputed bargain was struck subject to future or subsequent legislation. *See* 64 F.3d at 1541. On the one hand, the North Carolina lease agreements contain a provision in Sec. 1, which reads that the lease agreements were issued pursuant to the OCSLA of August 7, 1953, and subject to: "[that] Act; all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future ... and all other applicable statutes and regulations." SXs 128-180, Sec. 2 (emphasis added). This provision may not be read as an integration or nonintegration clause, but rather as a provision incorporating other terms by reference. This, however, does not necessarily mean that the contracts are subject to all subsequent statutes and regulations. Legislative acts that lie beyond the scope of this clause still may not alter, vary, or contradict the terms of the North Carolina lease agreements. The key to the linchpin, then, is to determine which legislative acts fall within the scope of Sec. 1. Through contract interpretation, this court has determined that future, subsequent statutes were not contemplated by the North Carolina lease agreements, much less statutes that suspended the leases through means beyond the scope of Sec. 13 of the contracts. Had the parties intended this to be the case, the government could have made this clear in drafting Sec. 1 of the leases. Despite the government's claims that the OBPA has retroactive effect, plaintiffs, in performing under the contracts at issue, were not "contractually bound" to comply with the OBPA. *See* 64 F.3d at 1541. Ultimately, while the second *Winstar* consideration is somewhat illuminative on the issue of breach, it does not provide conclusive support for either parties' motion.

The third consideration discussed in *Winstar* deals with regulatory noncompliance and penalties. That is, if a party to a contract would be subject to penalties for regulatory noncompliance but for the availability of certain special treatment accorded by the contract, then it is probable that subsequent legislation that eliminates such exceptional treatment is ineffective against those contractually bound parties. 64 F.3d at 1542. In this case, plaintiffs faced no such risk, except to the extent that any party attempting to explore and develop oil and gas resources on the OCS without a valid permit would be subject to applicable regulatory sanctions. As in *Winstar*, plaintiffs in the present case acquired their unique business opportunities solely as a result of contract formation. In both cases, subsequent legislation sought to deprive plaintiffs of a substantial portion of those opportunities. In this case, the legislation was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue.

Finally, the Federal Circuit in *Winstar* considered whether rights vested through contract formation can be overridden by future or subsequent legislation or regulation when the understood terms of the agreement amount to no more than a manifestation of "then-current prosecutorial and regulatory policy." *Winstar*, 64 F.3d at 1542. That court reasoned that the government's argument that contract terms bestowing special treatment upon parties may be disregarded as a mere statement of policy was of no moment.

> Once specific terms as to the [contract terms] were incorporated in a negotiated arm's length contract, both parties were bound to them. While it is true as the government argues that a statement of policy ... could be changed (which it later was), the contract could not be changed except by mutual consent.

Id. In the case at bar, the government does not go so far as to say that the provisions of the OCSLA were mere statements of environmental regulatory policy. Defendant does, however, suggest that where the two acts conflict, enactment of the OBPA supplants the OCSLA and, accordingly, controls the North Carolina leases thereafter. Thus, defendant argues that this court should grant its motion for summary judgment. Defendant's argument is without merit. In fact, granting defendant's motion would deprive both parties of the benefits of their bargain. This court finds that the government's implication that changing policies on environmental regulation, such as the OBPA, can subvert the parties' mutual assent, reduced to writing and memorialized in contract, rings hollow. "When performance of a duty under a contract is due any non- performance is a breach." RESTATEMENT (SECOND) OF CONTRACTS § 235(b) (1981), cited *inter alia* by *Winstar*, 64 F.3d at 1545. This court finds that defendant breached the North Carolina lease agreements by enacting the OBPA and subsequently implementing its provisions in derogation of plaintiffs' rights under those agreements.

III. Other Defenses

As a defense to plaintiffs' claims of breach of contract, the government contends that the sovereign acts doctrine shields it from liability. It is a well-settled point of law that the sovereign acts defense is included as an inherent term, whether express or implied, in every public contract. *Hughes Communic. Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed.Cir.1993). The sovereign acts doctrine has its genesis in the proposition that the government acts in a dual capacity--as both a contractor and a sovereign--and should not be held liable in contract for acts it performs as a sovereign. *See Jones v. United States*, 1 Ct.Cl. 383, 384-85, 1865 WL 1976 (1865); *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865). This is necessary to allow

the government to function properly unimpaired. The government, when acting as sovereign for the public welfare, cannot be expected to know, consider, or be held accountable for all of the many contracts it enters into as a contractor for the public welfare. *See Jones*, 1 Ct.Cl. at 384-85. The sovereign acts doctrine, however, is not intended to shield all government actions from liability for breach of contract. If all government actions qualified as sovereign acts, the government would be able to abrogate all of its public contracts without risk of liability for damages. *See United States v. Bostwick*, 94 U.S. 53, 68-69, 24 L.Ed. 65, (1876) (reviewing the decision of the Court of Claims and reasoning that the government contractually assumes responsibility for government acts that contravene its contractual obligations). The distinction between the two types of governmental actions, i.e., government qua sovereign versus government qua contractor, turns on the nature of the actions involved. *Hughes Communic. Galaxy*, 998 F.2d at 958-59 & n. 8.

In order for defendant to assert successfully the sovereign acts doctrine as a defense, the government must demonstrate that the alleged breach constituted an act by the sovereign that was "public and general in nature," not private and contractual. *Horowitz v. United States*, 267 U.S. 458, 460-61, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925); *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed.Cir.1995) (stating that "[t]he focus of the inquiry is thus the nature of the conduct, not the identity of the government agent responsible."). *In Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786 (1978), this court's predecessor determined that the SOI's denials of offshore oil permits did not merit sovereign acts immunity since they "were not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right[s]." *Id.* at 768, 572 F.2d at 817. Indeed, governmental acts that directly or intentionally, as opposed to incidentally,

impede specific contracts rather than promote the public interest are not sovereign acts within the meaning of this defense. A fortiori, a governmental act whose effect was specifically designed to obstruct performance is not a sovereign act. *See* CIBINIC & NASH, ADMINISTRATION 367-70 (3d ed. 1995). Perhaps most importantly, the Federal Circuit has recently drawn a fine distinction between those cases in which the sovereign acts doctrine is material and those in which it is not. While "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign," the Federal Circuit agreed with this court in regarding *POSSE* as being inapposite in cases where the sovereign's power to legislate was not at issue and where the plaintiffs sought only damages rather than to bind the sovereign's legislative or regulatory powers. *Winstar*, 64 F.3d at 1545-46 (quoting *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2392). As applied here, plaintiffs do not contend that the government is without legislative power as a sovereign to prohibit lease exploration, but only that its decision to do so through the OBPA gives rise to liability for damages for breach of contract.

The unmistakability doctrine, a corollary to the sovereign acts doctrine, states that the government never surrenders its legislative or regulatory powers unless the legislation authorizing the government to enter into the contracts at issue states otherwise in unmistakable terms. Put another way, the United States may avoid liability for breach of contract for acts it undertakes as a sovereign unless it explicitly agrees to be contractually bound in unmistakable terms. *Hughes Communic.*, 998 F.2d at 958; *see also POSSE*, 477 U.S. at 52, 106 S.Ct. at 2392; *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 618-19 (D.C.Cir.1992). The unmistakability doctrine stands or falls with the sovereign acts doctrine. *Resolution Trust Corp. v. FSLIC*, 34 F.3d 982, 984 (10th Cir.1994). In the case at bar, the government's

disputed act flows from enactment of the OBPA. Defendant argues that the OBPA is a public and general act of the government in its capacity as a lawmaker and, therefore, constitutes a sovereign act. According to defendant, the government was acting in its sovereign capacity to safeguard the environment. In support of this argument, defendant points to the structure of the OCS leasing program. According to defendant, the government, in leasing the OCS, was acting in both its sovereign and proprietary capacities because the OCS leases were specifically subject to the SOI's regulatory authority to preserve the natural resources of the OCS. Defendant thus suggests that laws affecting the environment are sovereign acts, public and general in nature, and that the government never surrendered its sovereign powers or immunity.

It is true that under the OCSLA the Secretary may promulgate regulations to protect the environment and that plaintiffs' leases are subject to those regulations. It is not true, however, that all of the government's actions taken to protect the environment are sovereign acts. The notion that an agency official could simply, through regulation, declare plaintiffs' leases null and void and avoid contract liability by citing environmental concerns was squarely rejected by this court in *Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723 (1981). In that case, the plaintiff was the successful bidder on a contract with the National Forest Service for the sale of timber. Because of environmental concerns, the government terminated the timber contracts. This court rejected the government's argument that it was acting as a sovereign. 227 Ct.Cl. at 422, 651 F.2d at 728. Similarly, in *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, (1978), this court rejected the argument that merely expressing a desire to protect the environment turns an action into a "sovereign act." *Sun Oil* involved an OCS lease, similar to the ones at issue, that was also subject to the

SOI's environmental regulations. The court, however, rejected the government's argument that the Secretary's denial of a permit to install an oil platform based on environmental considerations was a sovereign act. 215 Ct.Cl. at 768, 572 F.2d at 817. While the government has broad powers to regulate the environment, its actions are not necessarily sovereign acts merely because they are done in the name of environmental protection.

While the OBPA may have been the result of developing environmental concerns, it was not an act of public, general applicability. Further, the OBPA affected the public welfare incidentally at most. That act was "principally and primarily" enacted to restrict the SOI's ability to act on plaintiffs' POEs, thus binding his hands. The OBPA specifically targeted plaintiffs and prevented them from exercising their lease rights. It was specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina. *See Freedman v. United States*, 162 Ct.Cl. 390, 402, 320 F.2d 359, 366 (1963) ("The doctrine ... does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused"). As previously explained, plaintiffs in this case do not challenge the government's authority to enact the OBPA. They ask only for the benefit of their bargain or at least to be made whole by recovering the damages resulting from the enactment and enforcement of the OBPA. As in *Winstar*, this court concludes that the United States' sovereign power is not at issue in this case. The OBPA does not constitute a sovereign act. "The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar*, 64 F.3d at 1547. The sovereign acts doctrine is no bar to plaintiffs' claims for damages for breach of contract. After carefully considering defendant's arguments, the court

finds that neither the sovereign acts doctrine nor the unmistakability doctrine shields defendant from the liability the United States would otherwise bear for breach of contract. Thus, the court holds that as a result of the OBPA, defendant breached the North Carolina leases through its unilateral actions in suspending plaintiffs' leases, resulting in its failure to give plaintiffs' POEs full and fair consideration.

IV. Fifth Amendment Taking Claims

The Fifth Amendment prohibits the government from taking an interest in private property "for public use without just compensation." This clause is not a grant of power, but rather, a limitation on the exercise of power. Plaintiffs have stated no taking claim as to the North Carolina lease interests in their cross-motions for partial summary judgment. They have, however, failed to respond to defendant's motion for summary judgment on the taking issue. Defendant, citing *Southern Nev. Shell Dealers Assoc. v. Shell Oil Co.*, 725 F.Supp. 1104, 1109 (D.Nev.1989), argues that its motion, therefore, is unopposed and must be granted. RCFC 56(f), which conforms to the corresponding Federal Rule of Civil Procedure ("FRCP") 56(e), states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If such party does not so respond, summary judgment, if appropriate, shall be entered against such party.

(Emphasis added.) *See also Sweats Fashions, Inc.*, 833 F.2d at 1562, 1565. Given the fact-intensive nature of a takings

analysis and the evidence currently before the court, the government has not convinced this court that there are no material issues of fact rendering judgment as a matter of law appropriate. Accordingly, summary judgment on the taking issue cannot be granted at this phase of litigation.

CONCLUSION

After careful consideration of the oral testimony, exhibits, arguments, and the applicable law, the court denies defendant's motion for summary judgment and grants third-party plaintiffs' cross-motion for partial summary judgment on the breach of contract claims. The court denies defendant's motion for summary judgment on the Fifth Amendment taking issue.

With respect to the amount of damages to which the remaining plaintiffs may be entitled for breach of contract, the court will hold a formal status conference to discuss with the parties a schedule for resolution of the issue of the quantification of damages to be awarded.

IT IS SO ORDERED.

/s/ J. Robinson
J. Robinson
United States Judge

April 1, 1996

UNITED STATES COURT OF APPEALS,

FEDERAL CIRCUIT.

MARATHON OIL COMPANY AND MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

Plaintiffs-Appellees,

v.

UNITED STATES, Defendant-Appellant.

No. 97-5146.

May 13, 1999.

Before NEWMAN, PLAGER, and RADER, Circuit Judges.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by appellees, and a response thereto having been invited by the court and filed by the appellant,

Upon consideration thereof, it is

ORDERED that the petition for rehearing be granted for the limited purpose of clarifying this court's opinion.

IT IS FURTHER ORDERED that the previous opinion of the court in this appeal is withdrawn. The new opinion accompanies this order.

IT IS FURTHER ORDERED that the suggestion for rehearing *in banc* is declined.

The mandate of the court will issue on May 20, 1999.

Circuit Judge NEWMAN dissents in a separate opinion.

Circuit Judge RICH, Circuit Judge MICHEL, Circuit Judge CLEVENGER, Circuit Judge SCHALL, and Circuit Judge BRYSON did not participate in the vote.